

(1)
86-1746
No.

Supreme Court, U.S.

FILED

APR 30 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

LINDA J. DARNELL (ROSE), et al.,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOR THE FEDERAL CIRCUIT

Richard J. Leighton
Counsel of Record
1667 K Street, N.W.
Suite 801
Washington, D.C. 20006
(202) 955-3900
Counsel for Petitioners

LEIGHTON & REGNERY
Of Counsel
April, 1987



QUESTION PRESENTED

Whether, under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), as applied to the Civil Service Reform Act of 1978, 5 U.S.C. §§ 1101, 1201, et seq., federal agencies may terminate tenured public employees for cause without first granting those employees their requests for "an opportunity to present [their] side of the story"? Loudermill, 470 U.S. at 546.

PARTIES TO THE PROCEDURE

The Federal Aviation Administration of the Department of Transportation, which terminated the petitioners, was the opposing party in all cases and is the respondent here. Petitioners are the following persons who were terminated from federal employment and who had their claims adjudicated in the identified U.S. Court of Appeals for the Federal Circuit and Merit Systems Protection Board decisions:

Petitioner	Linda J. Darnell (Rose)
Federal Circuit Decision	Darnell (Rose), <u>et al.</u>
MSPB Decision	Martinkovic and Rose*

* Presiding official decision only. Pursuant to 5 U.S.C. §§ 7701(e)(1) and 7703(a), (b), petitioner appealed this decision directly to the court of appeals.

Petitioner	Robert Martinkovic
Federal Circuit Decision	Darnell (Rose), <u>et al.</u>
MSPB Decision	Martinkovic and Rose*
Petitioner	Charles D. Polley
Federal Circuit Decision**	Polley, <u>et al.</u>
MSPB Decision	Gardner, <u>et al.</u> *
Petitioner	Donald T. Shankle
Federal Circuit Decision**	Polley, <u>et al.</u>
MSPB Decision	Gardner, <u>et al.</u> * Leroy D. Alexander
Petitioner	Leroy D. Alexander
Federal Circuit Decision**	Alexander
MSPB Decision	Alexander and Jones*
Petitioner	Patrick W. McCormack
Federal Circuit Decision**	McCormack

** The principal authority cited in each case was
Darnell (Rose) v. Department of Transportation, 802
F.2d 943 (Fed. Cir. 1986).

MSPB Decision McCormack
Petitioner Richard E. Swauger
Federal Circuit
Decision** Swauger
MSPB Decision Swauger

TABLE OF CONTENTS

	Page
Opinions Below.....	2
Grounds for Jurisdiction.....	3
Constitutional Provisions Involved.....	3
Statutes Involved.....	4
Statement of the Case.....	7
Reasons for Allowing Writ.....	17
A. Overlooked or Misapprehended Principles of Law.....	29
1. The Federal Circuit Incorrectly Interprets Loudermill.....	29
2. The Federal Circuit Incorrectly Established a Harmless Error Exception to Constitutional Due Process Requirements.....	32
B. Misapplication of Law to Facts.....	36
1. The Federal Circuit Majority Incorrectly Found that Petitioners Had Replied.....	36
2. The Federal Circuit Majority Incorrectly Found that FAA had Considered Petitioners' Reply.....	40
Conclusion.....	43

TABLE OF AUTHORITIES

CASES	PAGE
<u>Alberico v. United States</u> , 783 F.2d 1024 (Fed. Cir. 1986).....	18,23
<u>Ake v. Oklahoma</u> , 470 U.S. 68 (1985)....	34
<u>Cleveland Board of Education v. Louder-</u> <u>mill</u> , 470 U.S. 532 (1985).....	Passim
<u>Darnell (Rose) v. Department of Trans-</u> <u>portation</u> , 807 F.2d 943 (Fed. Cir. 1986).....	Passim
<u>Delaware v. Van Arsdall</u> , 106 S. Ct. 1431 (1986).....	34
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976).....	33
<u>Mercer v. Health and Human Services</u> , 772 F.2d 856 (Fed. Cir. 1985)....	18,21,22,26,35
<u>Smith v. United States Postal Service</u> , 789 F.2d 1540 (Fed. Cir. 1986)....	18,24,25,26
<u>Swauger v. Department of Transportation</u> , Appeal No. 85-1752 (Fed. Cir. Dec. 9, 1986).....	28
<u>United States v. Hastings</u> , 461 U.S. 499 (1983).....	34
CONSTITUTIONAL PROVISIONS	
<u>U.S. Const. amend. V</u>	3

STATUTES

5 U.S.C. § 7513(b), (c), (d) and (e) (1980).....	4, 17, 19, 38, 42
5 U.S.C. § 7701(a) and (c) (2) (1980).....	6, 20
5 U.S.C. § 7703(a), (b) and (c) (1980 and Supp. 1986).....	6, 11
28 U.S.C. § 1254(1) (1966).....	3
28 U.S.C. §1295(a)(9) (Supp. 1987)...	11, 17

IN THE
SUPREME COURT OF
THE UNITED STATES

October Term, 1986

LINDA J. DARNELL (ROSE), et al.,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioners respectfully seek a writ
of certiorari to review the judgment of
the United States Court of Appeals for the
Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals in the case of petitioners Darnell (Rose) and Martinkovic (App., infra, 1a) is reported at 807 F.2d 943 (Fed. Cir. 1986). The decision of the Merit Systems Protection Board (MSPB) presiding official as to them is unreported (App., infra, 81a). The opinions of the court of appeals in the case of all other petitioners (App., infra, 51a-70a) are unpublished. The decisions of the MSPB in the case of petitioners Alexander, McCormack and Swauger (App., infra, 87a) are reported at 17 MSPR 346, 15 MSPR 512 and 16 MSPR 566 respectively. The opinion of the presiding MSPB official in the case of petitioners Polley and Shankle (App., infra, 84a) is unreported.

GROUND FOR JUDISDICTION

The judgment of the court of appeals (App., infra, 1a) was entered on November 26, 1986. A petition for rehearing was denied on December 31, 1986. On March 4, 1987, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including April 30, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1966).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V provides in pertinent part as follows:

No person shall be . . .
deprived of life, liberty,
or property, without due
process of law . . .

U.S. Const. amend. V.

STATUTES INVOLVED

1. 5 U.S.C. § 7513 provides in pertinent part as follows:

* * *

(b) An employee against whom an action is proposed is entitled to --

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b) (2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5. U.S.C. § 7513 (1980).

2. 5 U.S.C. § 7701 provides in pertinent part as follows:

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation.

* * *

(c)

* * *

(2). . . , the agency's decision may not be sustained . . . if the employee or applicant for employment --

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

* * *

(C) shows that the decision was not in accordance with law.

* * * *

5 U.S.C. § 7701 (1980).

3. 5 U.S.C. § 7703 provides in pertinent part as follows:

(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

* * *

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside

any agency action, findings, or conclusions found to be --

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence

* * *

5 U.S.C. § 7703 (1980 and Supp. 1986).

STATEMENT OF THE CASE

Petitioners are former Federal Aviation Administration (FAA or agency) employees who received notices of proposed removal that were identical in all relevant respects. In these, the FAA charged them with participating in the 1981 Professional Air Traffic Controllers Organi-

zation nationwide strike and being absent without leave while striking. The agency notice informed petitioners that, if they wished to reply to these charges, they must do so within seven days of receipt of the notice. See Notice of Proposed Removal, App., infra, 33a (Exhibit 1 of Appendix to dissenting opinion at 2).

The notice restated the employees' statutory right to reply orally in person and/or in writing. It listed only the FAA New York regional office as a return mailing address. Petitioners were fired from FAA facilities in the Washington, D.C., area and all resided in that area.

Petitioners responded by notifying the agency, in writing and at the address given, of their wish to reply to the charges and requested additional time to do so. The requests for extension and a

reply opportunity were received at FAA's New York address by the agency within seven days of petitioners' receipt of the notice. See App., infra, 38a (Exhibit 2 of Appendix to dissenting opinion at 3).

While waiting for a decision on their extension and reply opportunity requests, however, each petitioner received a termination letter that stated that he or she had "made no oral or written reply [to the charge]." See App., infra, 44a.

Sometime thereafter, each petitioner received another letter from the FAA deciding official stating that --

Your letter . . . requesting additional time in which to respond to your notice of intended removal . . . was received in this [the Washington, D.C., area facility] office . . . [after your termination].

* * *

However, we have carefully considered your request and find no reason to alter our decision [to terminate you].

App., infra, 49a (Exhibit 5 of Appendix to dissenting opinion at 7).

Before receipt of this second letter from the FAA deciding official, petitioners hand-delivered to that deciding official a letter reasserting their due process right by notifying her of their intention to reply to the charges against them. This second letter from petitioners stated that they had discovered (through the receipt of termination decisions by some controllers) that the processing of their request for a pretermination reply opportunity and extension of reply time therefor had been delayed in New York; that the delay in her receipt of their extension and hearing request was the

agency's fault, not theirs; and that their "future correspondence" (e.g., their written replies) would be hand-delivered. App., infra, 47a (Exhibit 5 of Appendix to dissenting opinion at 6). The FAA took no further action on the ground that petitioners already were terminated. Id.

Petitioners appealed their removals to the MSPB, which affirmed, and sought judicial review of this affirmance in the court of appeals.^{1/} They challenged their removal principally on the ground that they were not granted their due process right to defend themselves in a pretermination hearing. All court decisions

^{1/} Judicial review authority over such matters for federal courts of appeals is found at 5 U.S.C §7703 (b)(1) (Supp. 1986); exclusive jurisdiction in this regard was conveyed to the U.S. Court of Appeals for the Federal Circuit under 28 U.S.C. § 1295 (a)(9) (Supp. 1987).

relating to petitioners rely on Darnell (Rose) v. Department of Transportation, 807 F.2d 943 (Fed. Cir. 1986), App., infra, 1a, for resolution of the question at issue. (Unless otherwise indicated, all citations are to that opinion.)

The court of appeals panel majority determined that the agency fired petitioners before it considered the employees' replies to the agency's charges. 807 F.2d at 945 (App., infra, 4a). The panel majority also found that the FAA, upon post-termination review of the employees' requests for extensions to make replies, determined that these communications "contained nothing to alter the removal decision." Id.

The Darnell majority recognized the central importance of this Court's decision in Cleveland Board of Education v.

Loudermill, 470 U.S. 532 (1985). The majority interpreted Loudermill as implicitly requiring --

that an opportunity be given an employee to present his side of the story; not a guarantee that the employee must present his story to the agency prior to removal. An opportunity to present is quite different from a presentation in fact.

807 F.2d at 945 (emphasis in original) (App., infra, 7a).

The majority found that petitioners had an opportunity to reply to the charges against them, as evidenced by their requests to reply and pleas for sufficient time to do so, and that, by requesting to reply, they actually exercised their reply opportunity and demonstrated that they disagreed with the charges. 807 F.2d at 945 (App., infra; 4a). The panel further

held that petitioners' subsequent MSPB hearings were de novo hearings in which "[n]one of the defenses [presented] were [sic] legally sufficient, and none was a defense which might invoke the discretion of the agency's deciding official not to remove them." 807 F.2d at 946 (emphasis in original) App., infra, 11a.

Judge Cowen quoted Loudermill in his dissent and found on the facts that each petitioner was --

denied "an opportunity to present his side of the story" or to invoke the discretion of the [FAA] Facility Chief (the decision maker) before being terminated.

807 F.2d at 948 (dissent) App., infra, 22a, 23a.

Judge Cowen pointed out that the petitioners' "responses" to the FAA notices were received by the agency in a

timely fashion at the only return address given; that this address was not the location of the FAA deciding official, and that the letters were not forwarded from within the agency, itself, to the deciding official until after she had fired petitioners. Id. Further, Judge Cowen found that these letters clearly were timely requests for extensions of time to answer the charges at a requested subsequent pre-termination hearing, not substantive replies to the charges as found by the majority. Id. Judge Cowen concluded as follows:

I would hold that . . . when the final decision was made, the chief did not have petitioners' answers to the charges, which they would have submitted if the chief had rescinded the removal actions and granted them an oral hearing. Consequently, except for peti-

tioners' assertions that they had not committed a criminal offense, there was nothing for the Facility Chief to consider -- nothing to "invoke the discretion of the decision maker" -- except the requests for extensions of time. By that time, petitioners had already been fired (App. Exhibit 4) because of the chief's erroneous belief that they had not responded [to the charges] within the 7-day period. Thus, all the circumstances indicated that the final decision was based mainly, if not entirely, on that erroneous assumption.

Id. at 948, 949, App., infra, 24a, 25a.

Judge Cowen also determined that the harmless error rule may not be applied to the due process violations that occurred herein. 807 F.2d at 949, App., infra, 26a.

REASONS FOR ALLOWING WRIT

The court of appeals' decision on this important federal question conflicts with applicable decisions of this Court and with others of the Federal Circuit. The significance of the court of appeals' inconsistency on this question is increased now that the Federal Circuit has exclusive jurisdiction to review such matters.

28 U.S.C. § 1295(a)(9).

The constitutional right of tenured public employees to have a pretermination opportunity to reply to charges against them was confirmed in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), a case involving non-federal public employees. This principle is codified and amplified for all petitioners and most federal employees by the Civil Service Reform Act. 5 U.S.C. § 7513(b) (1980).

Federal agency compliance with this due process requirement has been addressed inconsistently by panels of the Federal Circuit. See Alberico v. United States, 783 F.2d 1024 (Fed. Cir. 1986) and Smith v. United States Postal Service, 789 F.2d 1540 (Fed. Cir. 1986). Not only do these Federal Circuit decisions cause confusion as to the application of Loudermill to federal employees, they conflict with that circuit's own decision in Mercer v. Department of Health and Human Services, 772 F.2d 856 (Fed. Cir. 1985). Granting the requested writ in the instant case will provide an opportunity to articulate the constitutional rights and obligations of federal employees and agencies in this important but uncertain area.

Under statutory law, before being fired, a federal employee must receive a

written explanation of the charges in a notice of proposed removal, and an opportunity to respond orally and/or in writing to the charges in such a notice. 5 U.S.C. § 7513(b).

A pretermination hearing at the employing agency offers the employee his or her only opportunity while still employed to discuss the matter in an informal atmosphere and usually with a lower level agency deciding official known personally to the charged employee. It is an opportunity to present proof informally and to ask questions about the charges. If the charges are true, it also is an opportunity to attempt privately to invoke the broad discretion of the decision maker by citing mitigating factors (length of service, prior record, etc.) or merely pleading for leniency and a second chance.

There is a vast difference between this informal opportunity to reply privately to a single person and the formal opportunity to defend publicly against an agency's charges, as this Court emphasized in Loudermill, 470 U.S. at 543.

Once fired, the federal employee seeking reinstatement through an appeal to the MSPB must confront his or her own federal agency ready to do battle in a formal adversarial adjudication. In these proceedings, the agency deciding official generally is a witness against the fired employee and part of the entire agency's proof that must be attacked publicly by the employee on the ground that the agency acted improperly. See 5 U.S.C. § 7701 (1980).

The Federal Circuit majority's failure in Darnell to join this Court in

recognizing the immense difference between pretermination and post-termination advocacy needs and opportunities does significant harm to the balances created by the Civil Service Reform Act. By minimizing the great importance of the constitutionally-guaranteed informal pretermination proceeding, and misinterpreting or ignoring this Court's teaching in that regard, the decision in this case encourages agencies to do what was done here -- to refuse to correct substantial due process errors and to ignore and deprecate an employee's timely attempt to reassert due process rights that have been erroneously withheld.

The Federal Circuit discussed the significance of the Loudermill decision to the federal civil service system in Mercer, finding that, "[w]here the agency

has adopted a procedure that provides for a predecision hearing, the denial of a predecision hearing is clear error."

Mercer v. Department of Health and Human Services, 772 F.2d 856, 859 (Fed. Cir. 1985) (emphasis added). No constitutional error was found in Mercer, because Mercer's union representative actually made an oral response to the charges in the notice of proposed removal on behalf of Mercer. However, Mercer's termination was reversed because he was denied an additional reply procedure established by Health and Human Services regulations. In articulating a principle that should have had even greater impact in the instant case because of the more important constitutional dimensions here, the Mercer panel unanimously stated:

Although the government argues that Mercer's exercise of

his right to an oral reply before the presiding official rendered harmless the denial of the additional predecision rights, we cannot agree. A person has a better and perhaps dispositive chance of successfully contesting termination of benefits before, not after, the benefits are terminated. See Goldberg v. Kelly, 397 U.S. 254, 264, 90 S. Ct. 1011, 1018, 25 L. Ed. 2d 287 (1970).

772 F.2d at 860.

The Federal Circuit also addressed this pretermination reply issue for federal employees in Alberico v. United States, 783 F.2d 1024 (Fed. Cir. 1986). In Alberico, an army reserve officer was terminated by the Army for criminal conduct. The majority opinion equated Alberico's formal criminal Article III trial -- which took place prior to his removal -- to an agency hearing. Judge Bissell, concurring, rejected the concept of reliance on a prior criminal trial to

satisfy civil due process needs, as well as implications in the opinion that a post-termination hearing would be constitutionally sufficient. 783 F.2d at 1030 (concurrence). She concurred on the basis of her finding that Alberico actually exercised his opportunity to reply to the charges through his counsel, and therefore concurred in the affirmance of his removal. 783 F.2d at 1030-31.

In Smith v. United States Postal Service, 789 F.2d 1549 (Fed. Cir. 1986), a unanimous panel of the Federal Circuit recognized the importance of the pretermination right to respond informally to charges. It stated that, if that right were denied "by agency action, negligence, or design, and in the face of even a reasonable effort by Smith to assert that

right, reversal would promptly follow."

789 F.2d at 1543 (emphasis added).

In Smith, Smith's union representative actually participated in a pretermination hearing without Smith's knowledge. The court cited the participation of the union representative, plus Smith's failure to attempt a timely reply, as evidence of his having exercised his constitutionally-guaranteed opportunity to respond.

Herein, the Federal Circuit majority retreats far from the principles that it set forth in Smith. Under Darnell, there was no pretermination appearance before the agency deciding official, or delay in asserting such a right, yet the Federal Circuit majority held that there was a waiver of further due process reply rights. Darnell stands for the proposition

that, if the employee merely hints at any issue regarding the substance of his or her proposed removal -- even if only in a request for reasonable opportunity to reply -- the constitutional right is waived. Further, a timely objection to an improperly issued letter of termination -- which was emphasized as critically lacking in Smith -- does not aid in restoring an employee's misappropriated due process right to reply under Darnell. Under this decision, the agency may "[play] 'fast and loose' with the procedure designed to insure protection of employees' rights" without fear of sanction. Smith, 789 F.2d at 1543.

Inexplicably, although quoted with approval in Mercer, 772 F.2d at 859, the majority holding in Darnell completely

ignores the following plain teaching of this Court in Loudermill --

Even where the facts [providing grounds for removal] are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.

470 U.S. at 543.

Moreover, the Federal Circuit's decision in Darnell confuses the roles of the deciding agency official, which is to exercise discretion informally and unilaterally, and the reviewing authority of the MSPB presiding official, to find facts and make adjudications in an adversarial proceeding.

This confusion may be illustrated by the same majority's reliance upon Darnell to affirm the termination of Richard E. Swauger, one of the petitioners herein.

See Swauger v. Department of Transportation, Appeal No. 85-1752 (Fed. Cir. Dec. 9, 1986), App., infra, 67a. Mr. Swauger failed to receive a pretermination hearing based on facts identical to those in Darnell. He formally presented during his MSPB adjudication factual defenses that he had been denied the opportunity to present informally at the agency level prior to his removal.^{2/} The majority failed to acknowledge that petitioner raised what the panel members, themselves, characterized in Darnell as "a defense which might invoke the discretion of the agency's deciding official not to remove [him]." 807 F.2d at 946 (emphasis in the

2/ One of the defenses Mr. Swauger alleged was emotional incapacitation to work, due to the recent near collision of two aircraft on his watch for which he had sole responsibility.

original), App., infra, 11a. Failure to raise such a defense before the MSPB was relied on in finding that petitioners in Darnell were "not denied 'the only meaningful opportunity to invoke the discretion of the decision maker'." Id., App., infra, 11a.

A. OVERLOOKED OR MISAPPREHENDED PRINCIPLES OF LAW

1. The Federal Circuit Incorrectly Interprets Loudermill

The panel majority correctly noted that the Loudermill decision requires that "[t]he tenured public employee is entitled to . . . an opportunity to present his side of the story." 807 F.2d at 945, App., infra, 5a. The majority then interprets this requirement as "not a guarantee that the employee must present his story to the agency prior to removal. An oppor-

tunity to present is quite different from a presentation in fact." Id., App., infra, 7a (emphasis in the original). This interpretation, as applied in Darnell, is contrary to the following principles announced in Loudermill:

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.

470 U.S. at 542 (citations omitted) (emphasis added). This Court amplified this concept by holding that ---

[t]he essential requirements of due process, . . . are notice and an opportunity to respond.

The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

470 U.S. at 546 (citations omitted).

In the context of Loudermill, the opportunity "to present his side of the story" clearly must mean an opportunity exercisable before the decision to terminate the employee is made. To be sure, an employee may waive his or her right. But, contrary to the implication of the Darnell majority, this clearly cannot happen under circumstances such as those here. In its proper factual context, the Darnell majority's interpretation amounts to a perverse holding that the mere assertion of a guaranteed right in a timely request to exer-

cise that right can be deemed a waiver of the right. We respectfully submit that the Darnell majority thus stands the due process clause on its head. We submit that this Court properly held that the Constitution guarantees a federal employee the right to have his or her response to the charges in a proposed removal not only considered, but considered prior to the decision on his or her termination.

2. The Federal Circuit Incorrectly Established a Harmless Error Exception to Constitutional Due Process Requirements.

The Darnell majority asserts that any agency errors in the constitutionally-mandated pretermination procedures were harmless, thus creating a "harmless error" exception to constitutionally-mandated procedural due process in removal cases. 807 F.2d at 946, App., infra, 8a.

It is the interest in avoiding any underlying error upon which the due process requirement is based. This Court -- by weighing the possibility of errors in determining whether a due process violation occurred -- has determined that a violation of such a right can never be "harmless."^{3/}

The criminal law decisions of this Court cited by the Federal Circuit majority fail to bolster their assertion. They stand solely for the proposition that, when a trial has been held, the Constitution does not require it to be

3/ See, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

error-free within certain limits.^{4/} More important, this Court recently addressed the issue of due process in the criminal context and failed to raise the issue at all. Ake v. Oklahoma, 470 U.S. 68 (1985). While error in the conduct of a trial may at times be harmless, the denial of a

4/ Delaware v. Van Arsdall, 106 S. Ct. 1431 (1986), dealt with the confrontation clause, while United States v. Hasting, 461 U.S. 499 (1983), dealt with comments by the prosecutor that allegedly violated the defendant's right not to testify. The panel majority ignored the Court's observation in Hasting that —

[In Chapman v. California,
386 U.S. 18 (1967)] [t]he Court
acknowledged that certain errors
may involve "rights so basic to a fair
trial that their infraction can never
be treated as harmless error." 386
U.S. at 23, citing Payne v. Arkansas,
356 U.S. 560 (1958) (coerced confes-
sion); Gideon v. Wainwright, 372 U.S.
335 (1963) (right to counsel); Tumey
v. Ohio, 273 U.S. 510 (1927)
(impartial judge).

461 U.S. at 508 n.6.

constitutionally-mandated trial, itself, is never harmless. In the instant case, the error is the denial of a constitutionally-mandated hearing, itself, and not merely a flaw in such hearing. Harmless error has never been applied to such a situation, and never should, under a correct reading of Loudermill.

The Federal Circuit's findings of harmless error conflicts with its own decision in Mercer. Mercer held that denial of a pretermination hearing that was guaranteed merely by regulation could not be harmless. This circuit, in Mercer, put a higher value on a regulatory right than it did, in Darnell, on a recognized constitutional right. Such a jarring inequality should not be allowed to remain.

B. MISAPPLICATION OF LAW TO FACTS

1. The Federal Circuit Majority Incorrectly Found That Petitioners Had Replied.

Contrary to the assertion of the Federal Circuit majority, petitioners did not reply to the substantive charges made in their notices of proposed removal. The "reply" cited by the majority plainly is nothing more than a timely request for a pretermination reply opportunity and for a reasonable extension of the minimum seven-day reply time to prepare for it. This request by petitioners to the agency is set forth in App., infra, at 38a (Exhibit 2, Appendix to dissenting opinion at 3). It cannot support the Federal Circuit majority's clearly erroneous finding that the petitioners responded in writing to the charges in their notice of proposed removal. 807 F.2d at 944, App., infra, 8a.

Petitioners' letters notify their facility chief of their intent to answer the charges in person, request an opportunity to review the evidence on which the charges were based and state, inter alia, that "there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed." The Federal Circuit majority expressly recognizes this. 807 F.2d at 944. Inexplicably, however, the majority ignores the identical opening paragraph of each letter that states that its purpose is "to request an extension of time in which to file a written answer to the notice of proposed [termination] action." This request was necessitated by the agency's express invocation of the rarely-used crime exception to the 30-day notice requirement. The FAA termination notices

to which petitioners were responding stated that the agency had --

reasonable cause to believe you have committed a crime for which a sentence of imprisonment can be imposed. Therefore, you may reply to this notice personally, in writing or both, and furnish affidavits and other documentary evidence in support of your answer to me, within 7 calendar days after you receive this letter.

App., infra, at 33a (Exhibit 1, Appendix to dissenting opinion at 2). Cf. 5 U.S.C. § 7513(b)(1) and (2). It was in light of this assertion that petitioners informed the agency in their request for a reply opportunity and extension therefor as follows:

First, there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed. Therefore, the crime exception to the rule set forth in 5 U.S.C. § 7513, which requires that I be given a thirty (30) day advance notice of this proposed action, is inapplicable.

App., infra, 38a (Exhibit 2, Appendix to dissenting opinion at 3). When quoted in full context, rather than partially as the Federal Circuit majority did, petitioners' claim that they had not committed a crime is seen for what it was -- a basis for objecting to the foreshortened response time. It was not, as the panel majority asserts, a substantive denial of the charges that constituted a full exercise of their constitutional and statutory reply rights. 807 F.2d at 944, 945, App., infra, 8a. Had the panel majority properly understood the clear meaning of petitioners' letters, it would have been forced to find a violation of petitioners' constitutional right to pretermination hearings and reversed petitioners' removals.

2. The Federal Circuit Majority Incorrectly Found that FAA Had Considered Petitioners' Reply.

The agency never charged petitioners with a crime. Petitioners had no such charge to which they could reply, even if they wanted. However, the Federal Circuit majority compounds its misreading of the agency notice and petitioners' initial request by also misinterpreting the second letter sent from the FAA to petitioners, as follows:

[T]he Agency reviewed the [petitioners'] replies and determined and advised petitioners that they contained nothing to alter the removal decisions.

* * *

Hence, the petitioners were afforded an opportunity to present their side of the story at the agency level

807 F.2d at 945, App., infra, 8a.

The FAA letter to which the panel majority refers states that "[w]e have

carefully considered your request and find no reason to alter our [termination] decision." App., infra, at 49a (Exhibit 6, Appendix to dissenting opinion at 7) (emphasis added). That decision was made by the FAA without a pretermination hearing and on its express finding that no reply to the charges was made or requested. See App., infra, 33a, 36a (Exhibits 1 and 2, Appendix to dissenting opinion). The only "request" that petitioners had made was a request for an opportunity to reply after the seven-day period. This fact could not be noted more clearly in the first paragraph of the subject FAA letter, which was not cited by the Federal Circuit majority: "Your letter dated August 11, 1981 requesting additional time in which to respond to your notice of intended removal . . . was received in

this office" See App., infra, 49a (Exhibit 6, Appendix to dissenting opinion at 7) (emphasis added). A plain reading of this agency's letter will show equally clearly that the FAA, itself, did not consider petitioners' reference to the statutory crime exception to be petitioners' written defense against the enumerated charges. Had it so considered that statement, the agency would have followed required procedures and notified petitioners, in their removal letters, that it had considered their specific reply and had rejected it. 5 U.S.C. § 7513 (b)(4), (e).

Even if one were to accept the Federal Circuit majority's incorrect assertion that petitioners did respond to the notice of proposed removal by giving "their side of the story," it is clear that the agency

did not consider that response as it was constitutionally required to do. See App., infra, 33a, 38a (Exhibits 1 and 2, Appendix to dissenting opinion). A constitutionally-mandated opportunity to respond is meaningless in the absence of a corresponding duty upon the decision maker to consider that response. The petitioners' responses expressly not having been considered as replies to the charges in this case, the removals must be reversed.

CONCLUSION

Termination of career federal public servants such as petitioners is the harshest penalty under the Civil Service Reform Act. Where the servants' career requires considerable specialization and is one that exists virtually only within the federal public sector, as in the present

case, termination amounts to career capital punishment. To take a person's economic life without being willing to listen to his side of the story is fundamentally wrong under American law and public policy. This Court must make that clear before it happens again.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard J. Leighton
LEIGHTON AND REGNERY
1667 K Street, N.W.
Suite 801
Washington, D.C. 20006
(202) 955-3900

April, 1987

Counsel for Petitioners

86 1746

No.

②
Supreme Court, U.S.
FILED

APR 30 1987

JOSEPH F. SPANOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

LINDA J. DARNELL (ROSE), et al.,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOR THE FEDERAL CIRCUIT

Richard J. Leighton
Counsel of Record
1667 K Street, N.W.
Suite 801
Washington, D.C. 20006
(202) 955-3900
Counsel for Petitioners

LEIGHTON & REGNERY
Of Counsel
April, 1987



TABLE OF CONTENTS

	Page
APPENDIX A, Decisions Below.....	1a-70a
APPENDIX B, Judgments.....	71a-80a
APPENDIX C, Rehearing and En Banc Orders.....	81a-95a
APPENDIX D, MSPB Opinions and Orders.....	96a-121a
APPENDIX E, MSPB Presiding Official Deci- sions.....	122a-217a



APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 85-1578
MSPB Docket Nos. DC075281F1026 and
DC075281F1097

LINDA J. DARNELL (ROSE), ET AL.,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION,
Respondent.

DECIDED: November 26, 1986

Before RICH and DAVIS, Circuit Judges, and
COWEN, Senior Circuit Judge

RICH, Circuit Judge

This appeal is from the February 25, 1983, final decision of the Merit Systems Protection Board (board), in Nos. DC075281F1026 and DC075281F1097, sustain-

(1a)

ing the decisions of the Federal Aviation Administration (FAA) to remove petitioners Linda J. Darnell and Robert Martinkovic from their positions as air traffic controllers based on their participation in the illegal strike called in 1981 by the Professional Association of Air Traffic Controllers (PATCO) and for being absent without leave (AWOL) during the strike. Oral argument was heard on April 28, 1986. We affirm.

I. Background and Issue Presented

The background facts of the PATCO strike are set forth in the "lead cases" of this court in the air traffic controller litigation. See Schapansky v. Department of Transportation, Federal Aviation Administration, 735 F.2d 477 (Fed. Cir.), cert denied, 105 S.Ct. 432 (1984).

Petitioner Robert Martinkovic was on approved leave or regular days off from sometime in July, 1981, through August 9, 1981. He was charged with striking and being AWOL on August 10 after he failed to report for duty on his deadline shift that day.

Petitioner Linda J. Darnell (Linda J. Rose at the time of these events) was charged with striking and being AWOL from August 4 to 6, 1981, in a notice of proposed removal issued August 6, 1981.

Both petitioners replied in writing*/ to their notices of proposed removal with-

*/ These were identical "lawyer letters," obviously provided by PATCO, appointing a Mr. Ferman of PATCO to be their representative, and asserting various demands and legal propositions under statutes and regulations. Petitioners simultaneously signed and sent identical requests to FAA under the Freedom of Information Act for multifarious kinds of information and documents in three different categories. See Dorrance v. DOT, FAA, 735 F.2d 516, 518 (Fed. Cir. 1984).

in the proper seven-day period, notifying their facility chief of their intent to answer the charges in person, requesting an opportunity to review the evidence on which the charges were based and stating, inter alia, that "there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed." Petitioners were removed before these written replies were received. Upon receipt, the agency reviewed the replies and determined and advised petitioners that they contained nothing to alter the removal decisions.

Petitioners appealed to the MSPB urging reversal of their removal on various technical grounds.

The broad issue presented by this appeal is whether petitioners' constitutional rights were abridged because the

FAA did not give them "an explanation of the employer's evidence and an opportunity to present their side of the story" basing their arguments on Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). "Their side of the story" includes the specific arguments made to the MSPB which presumably would have been made to the agency including adequacy of the notice of proposed removal, failure of the FAA to prove the strike was still going on when they were AWOL, that the facility would not have permitted petitioners to work if they had tried, and the fact the FAA made a mistake in sending out a form letter saying they had made no reply.

II. OPINION

In Loudermill, the United States Supreme Court stated that "[t]he opportunity

to present reasons, either in person or in writing, why proposed action [to remove a public employee] should not be taken is a fundamental due process requirement." 470 U.S. at 546. All that is required to meet the essential requirements of due process "are notice and an opportunity to reply." Id. at 546. The August 6 and August 10, 1981, notices of proposed removal provided petitioners with detailed reasons for the adverse action and the location and the person to contact for review of the materials relied upon by the agency to support the removal action. The notices further stated that "you may reply to this notice personally, in writing or both, and furnish affidavits and other documentary evidence in support of your answer to me, within 7 calendar days after you receive this letter."

Hence, the agency clearly met the first two parts of the tripart test set forth in Loudermill. "The tenured public employee is entitled to [1] oral or written notice of the charges against him, [2] an explanation of the employer's evidence, and [3] an opportunity to present his side of the story." Loudermill, 470 U.S. at 546. Implicit in the third part of the test is that an opportunity be given an employee to present his side of the story; not a guarantee that the employee must present his story to the agency prior to removal. An opportunity to present is quite different from a presentation in fact.

Both petitioners replied in writing to these notices within the seven-day period. Unfortunately, the replies were not received by the agency until after the

expiration of the seven-day period and after issuance of the removal letters. However, the agency reviewed the replies and determined and advised petitioners that they contained nothing to alter the removal decision. Hence the petitioners were afforded an opportunity to present their side of the story at the agency level and any errors committed by the agency were in the nature of procedural errors and were not errors of constitutional dimension.

In the context of criminal cases, the Supreme Court has stated that the Constitution entitles a criminal defendant to a fair trial, not a perfect one. Delaware v. Van Arsdall, No. 84-1279 (U.S., April 7, 1986), slip op. at 8; United States v. Hasting, 461 U.S. 499, 508-09 (1983).

Similarly, in the context of federal employee cases, the Supreme Court stated:

We do not believe that Congress intended to force the Government to retain these erring employees solely in order to "penalize the agency" for nonprejudicial procedural mistakes it committed while attempting to carry out the congressional purpose of maintaining an effective and efficient Government.

Cornelius v. Nutt, 105 S. Ct. 2882, 2891 (1985) (citation and footnote omitted). Title 5 of the U.S. Code, §7701(c)(2)(A) provides specifically that the agency's decision should be overturned only "if the employee shows harmful error in the application of the agency's procedures." 5 CFR 1201.56(c)(3) defines "harmful error" as error which might have caused the agency to reach a different conclusion than the one reached. Accord Cornelius v. Nutt, supra.

Petitioner's (sic) standardized PATCO form "reply" to the agency's notice of proposed removal stated merely that "there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed." Such a response cannot suffice to overcome a prima facie showing of strike participation. An unrebutted prima facie case of strike participation amounts to proof of the charges by a preponderance of the evidence. Hale v. Department of Transportation, 772 F.2d 885 (Fed. Cir. 1985).

The initial replies filed by petitioners in this case do not indicate that petitioners could or would have presented proof prior to the issuance of the removal letters that could have affected the FAA's factual conclusion that both petitioners participated in the strike. Thus, the

perhaps premature issuance of the removal letters in the context of this case, where the written replies by the petitioners were considered by the agency after the fact and do not on their face give any indication that receipt of the replies prior to issuance of the removal letters could have affected the agency's underlying factual conclusion, was harmless error. Moreover, petitioners had a full opportunity to present their additional defenses at their de novo hearings before the board. None of the defenses were legally sufficient, and none was a defense which might invoke the discretion of the agency's deciding officia' not to remove them. Thus, they were not denied "the only meaningful opportunity to invoke the discretion of the decision-maker." Loudermill, 470 U.S. at 543. Accord Smith.

v. U.S. Postal Service, 789 F.2d 1540
(Fed. Cir. 1986). The arguments in the
briefs before this court have all been
considered and none justifies any change
in the board decision.

III. Conclusion

Accordingly, the decision of the
board is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-1578
MSPB Docket Nos. DC075281F1026 and
DC075281F1097

LINDA J. DARNELL (ROSE), ET AL.,
PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION,
RESPONDENT.

COWEN, Senior Circuit Judge, dissenting.

I cannot agree with the court's decision. I believe that the crucial facts, most of which are omitted from the opinion of the majority, demonstrate that the rights guaranteed to petitioners by the Due Process Clause were violated, because they were not granted a pretermination hearing before they were discharged. A

discussion of the constitutional rights to which petitioners were entitled is set forth in the recent decision of the Supreme Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). I am convinced that in holding that the denial of due process in this case was harmless error, the majority failed to follow the teaching of the Supreme Court in that case.

I.

Most of the facts upon which I rely are established by documentary evidence, copies of which are included in the appendix to this dissent. Except for immaterial differences in dates, the facts pertinent to the cases of both petitioners are substantially identical, so that an account of the facts pertaining to the

claim of Linda J. Darnell will suffice for both petitioners.

On August 7, 1981, petitioner Darnell received a form letter (App. Exhibit 1) from the Department of Transportation, Federal Aviation Administration (FAA), dated August 5, 1981, and signed by the Facility Chief at Andrews Air Force Base Control Tower, Camp Springs, Maryland. The letter stated that the chief proposed to terminate petitioner's position as an air traffic control specialist for participation in an illegal strike ("a crime for which a sentence and imprisonment can be imposed"), and for being AWOL. The letter gave notice that the material relied on to support the action was available for review at the Control Tower, and stated that petitioner had a right, within 7 calendar days after receipt of the letter,

to reply personally, in writing or both, and furnish affidavits or other documentary evidence in support of her answer. The letter did not use the facility address in Camp Spring, Maryland, as the return address for the reply. Instead, the return address shown on the notice was the address of the Eastern Region of the FAA in Jamaica, New York, hundreds of miles away.

On August 11, 1981, petitioner responded to the notice by letter (App. Exhibit 2), which was received in the Jamaica, New York office of FAA on August 17, well within the 7-day reply period. The reply requested (1) an extension of time in which to file a written answer to the notice of proposed action; (2) copies of the materials relied on to support her proposed removal, and (3) an extension of

20 days time after receipt of the materials to personally answer the charges. The reply also stated: "There is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed."

On August 11, 1981, petitioner sent a written request (App. Exhibit 3) to the Washington office of the FAA, under the Freedom of Information Act, for three categories of information. The request stated that the information was needed by petitioner because of the disciplinary proceeding that had been initiated against her. She stated that if the charges for a search and for the copies she needed could not be waived, she would pay reasonable charges. The record before us does not indicate that there was any response to this request.

Petitioner's reply to the charges, timely received in the Jamaica, New York, office on August 17, 1981, was not forwarded to and received by the Camp Springs facility until August 20, 1981. In the meantime, by form letter (App. Exhibit 4) dated August 18, 1981, signed by the Facility Chief, petitioner was notified of her removal. The letter stated that the chief had given full consideration to the fact that petitioner had made no oral or written reply, and that the evidence fully supported the charges and warranted petitioner's removal. The letter, referred to herein as the initial decision, also showed the Jamaica, New York address as the return address for replies. Apparently the chief had not seen and did not know that petitioner had replied to the pro-

posed action by letter to the New York address.

On August 22, 1981, petitioner Robert Martinkovic and another air traffic controller delivered an unsigned letter (App. Exhibit 5) to the Camp Springs Facility. The letter stated that the responses to the letters proposing the removal of several air traffic controllers had not been received at the facility, because of the slow processing of the replies by the Eastern Region of the FAA in Jamaica, New York. In her handwritten note on this letter, the chief stated that there would be no response since the letter from Martinkovic had been received after the issuance of the initial decisions in which petitioners were terminated.

After petitioner's initial reply of August 11, 1981 had been forwarded to Camp Springs from Jamaica, the Facility Chief issued her final decision (App. Exhibit 6) in a letter dated August 21, 1981. The letter stated that petitioner's reply requesting additional time to respond had been received, but that since the request had not been received until after the end of the 7-day period, the removal decision of August 18 had been issued. This letter further stated: "However, we have carefully considered your request and find no reason to alter our decision." This letter, referred to herein as the final decision of the Facility Chief, used the Camp Springs, Maryland return address

for the first time in the correspondence between the parties.^{1/}

In Loudermill, the Supreme Court prescribed the minimum requirements of a pre-termination hearing as follows:

The essential requirements of due process * * * are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. See Arnett v. Ken-

1/ Petitioner Martinkovic's notice of proposed removal was sent August 10 and received by him August 12. His reply was sent August 14, and received at Jamaica, New York August 18. It was received at Camp Springs and rejected on August 25. The removal notice was sent August 21 and received by Martinkovic on August 25.

nedy, 416 U.S. at 170-171, 94
S.Ct., at 1652-1653 (opinion
of POWELL, J.) * * *.

(470 U.S. at 546.)

It is implicit in the Court's decision that the employee's constitutional right to respond to a proposed dismissal must be a meaningful opportunity and one which receives the consideration of the decision maker. That much is clear from the Court's observation in Loudermill, as follows:

Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision-maker is likely to be before the termination takes effect.

(Id. at 543.)

When the quoted pronouncements of the Supreme Court are applied to the facts of this case, it is plain that each petition-

er was denied "an opportunity to present his side of the story" or to invoke the discretion of the Facility Chief (the decision maker) before being terminated. Although the petitioners sent timely responses to the return address shown on the notices, the Facility Chief terminated them without seeing the responses in the mistaken belief that they had made no oral or written reply. The delay in the decision maker's receipt of the replies was due to the slow processing of the replies by the Eastern Region of the FAA and was not the fault of petitioners.

As indicated above, petitioners' responses consisted almost entirely of requests for extensions of time to answer the charges with the aid of documents they hoped to obtain. After their replies had been forwarded from Jamaica, New York, to

the Facility Chief, she should have realized that the letter terminating petitioners had been erroneously issued. At that time, she could have rescinded the removal actions and granted petitioners' requests to reply in person. Instead, the Facility Chief denied the requests in a decision, which I think was nothing more than a perfunctory reiteration of her erroneous conclusion that petitioners had failed to submit oral or writtn replies within the required 7-day period.

It is true that the final decision contained the statement that after careful consideration of petitioners' requests, the chief had found no reason to alter the decision terminating them. However, I would hold that this statement did not remedy the denial of due process. The statement was part of a printed form (App.

Exhibit 6), which had been prepared long before, and when the final decision was made, the chief did not have petitioners' answers to the charges, which they would have submitted if the chief had rescinded the removal actions and granted them an oral hearing. Consequently, except for petitioners' assertions that they had not committed a criminal offense, there was nothing for the Facility Chief to consider -- nothing to "invoke the discretion of the decision maker" -- except the requests for extensions of time. By that time, petitioners had already been fired (App. Exhibit 4) because of the chief's erroneous belief that they had not responded within the 7-day period. Thus, all the circumstances indicate that the final decision was based mainly, if not entirely, on that erroneous assumption.

The net result of the documentary evidence discussed above is that petitioners were denied the minimum requirements of the due process to which they were entitled under the holding in Loudermill.

III.

Although the majority holds that the denial of a pretermination hearing in these cases was harmless error, it is my opinion that the harmful error rule, which is codified in 5 USC § 7701(c)(2)(A) and 5 CFR § 1201.56(c)(3), does not apply to the denial of due process in this case.

In the first place, the majority bases its conclusions on Cornelius v. Nutt, 105 S.Ct. 2882 (1985) and Smith v. United States, 789 F.2d 1540 (Fed. Cir.

1986) -- two decisions which are inappropriate.

In Nutt, the Supreme Court held that the harmful error rule does not permit an arbitrator to overturn agency disciplinary action on the basis of a significant violation of the collective-bargaining agreement that is harmful only to the union. The Supreme Court also upheld the interpretation by the Merit Systems Protection Board that the rule requires the individual employee to show error that causes substantial prejudice to his individual rights. However, the constitutional issue before us was in no way involved in Nutt. It was never raised by the parties, nor was it considered or even mentioned in the Supreme Court's decision.

Smith v. United States is even less pertinent. The controlling facts on which

that decision was based do not bear even a remote resemblance to the facts in this case. In contrast to the facts before us here, the court's decision in Smith shows that his union representative made an oral reply to the agency's deciding official, and the court found that there was nothing of record to indicate that Smith attempted to present, or that he was prevented from presenting, either an oral or a written reply to the deciding official. The court also found that Smith had failed to avail himself of his statutory right to answer orally, and that he made no effort to obtain a Step 1 hearing at which he might be present. The court concluded: "No basis exists for Smith's assertion respecting constitutional due process." 789 F.2d 1541-1542.

Secondly, the majority declares that since none of the defenses which petitioners presented at the de novo hearing before the Merit Systems Protection Board was legally sufficient, the premature issuance of the removal letters was harmless error which would not have affected the agency's decision. The majority then moves from this premise to the conclusion that since petitioners did not prevail in the MSPB hearing, none of petitioners' defenses was a defense which might have "invoked the discretion of the decision-maker." In my opinion, these conclusions ignore the teaching of Loudermill that the tenured employee who is denied due process is not required to establish that if he had been granted a proper pretermination hearing, his presentation would have met with "certain success." Specifically, the

Supreme Court stated that the employee's "right to a hearing does not depend upon a demonstration of certain success." Id. at 544.

For that proposition, the Supreme court cited Carey v. Piphus, 435 U.S. 247, 266 (1978), in which the Court declared:

Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, see Boddie v. Connecticut, 401 U.S. 371, 375 (1971); Anti-Fascist Committee v. McGrath, 341 U.S. at 171-172 (Frankfurter, J., concurring), we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. (Emphasis supplied). [Footnote omitted.]

IV.

For the reasons stated, I would vacate the decision of the Merit Systems

31a

Protection Board and remand the case, with instructions to the agency to restore petitioners to their former positions and to grant them back pay as provided by law.

APPENDIX TO DISSENTING OPINION

Linda J. Darnell (Rose), et al.,

Petitioners

v.

Department of Transportation
Federal Aviation Administration,

Respondent.

Appeal No. 85-1578

33a

APPENDIX TO DISSENTING OPINION

EXH. #1, page 1

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

EASTERN REGION
FEDERAL BUILDING
JOHN F. KENNEDY
INTERNATIONAL AIRPORT
JAMAICA, NEW YORK 11430

August 6, 1981

Linda J. Rose

3331 Huntley Square Drive, T1

Temple Hills, MD 20748

Dear Ms. Rose :

This is notice that I intend to remove you from your position of Air Traffic Control Specialist, GS-2152-9/01, \$ 18,535 per annum at the Andrews AFB Control Tower, Camp Springs, MD. The reasons for the proposed action are:

Reason 1: Violation of 5 U.S.C. 7311, which states in pertinent part, "An individual may not accept or hold a

positin in the Government of the United States . . . if he . . . participates in a strike against the Government of the United States..."; and 18 U.S.C. 1918, which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.

Specification: Beginning at approximately 7 A.M. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at 4:00 PM, on August 04, 1981, when you failed to report for duty, until the present, you participated in a strike against the United States Government. .

Reason 2: Unauthorized Absence

Specification: Beginning first at the 4:00 PM EDT to 12:00 AM EDT shift on August 04, 1981, you failed to report for your scheduled tour of duty. On August 03, 1981, you were sent a telegram that an illegal strike was in progress, and that you must return to duty for your regularly scheduled shift. You failed to return to duty, and instead remained absent without authorization.

The material relied upon to support this proposed action is available for review at Andrews AFB Control Tower, Camp Springs, MD. If you wish to review this material, please contact Charlesan Neugebauer.

APPENDIX TO DISSENTING OPINION

EXH. 1 - page 2

The foregoing action constitutes a strike against the government prohibited by 18 U.S.C. 1918, and 5 U.S.C. 7311. This gives me reasonable cause to believe you have committed a crime for which a sentence of imprisonment can be imposed. Therefore, you may reply to this notice personally, in writing or both, and furnish affidavits and other documentary evidence in support of your answer to me, within 7 calendar days after you receive this letter. In making a reply you have the right to be represented by an attorney or other representative. As soon as possible after your reply is received, or after the expiration of the 7-day limit if

37a

you do not reply, I will issue a written decision on the proposed removal.

s/Charlesan Neugebauer
Facility Chief
Andrews Tower

In this space is a copy
of a postal receipt
signed by Linda Rose
on August 12, 1981

In this space
is a copy of
the correspond-
ing senders
receipt

38a

APPENDIX TO DISSENTING OPINION
EXH. 2

11 August 1981

Department of Transportation
Federal Aviation Administration
Eastern Region, Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430

Re: Linda J. Rose

Dear Ms. Neugebauer:

This is to request an extension of time in which to file a written answer to the notice of proposed action against me for the reasons stated below.

First, there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed. Therefore, the crime exception to the rule set forth in 5 U.S.C. S.7513, which requires that I be given a thirty (30) day advance notice of this proposed action, is inapplicable.

I also understand that even if the crime exception to the 30-day rule is invoked, the controlling criterion is that I am entitled to a "reasonable time," (which may not be less than seven days) in which to file my answer, 5 U.S.C. S.7513(b) (2). I do not feel that, under the circumstances that apply, seven days is a reasonable time for filing a response.

I request that copies of all the materials relied on by the FAA to support its proposed action be sent to me. By separate letter to the Freedom of Information Office of the FAA, I am also requesting disclosure of all notices of proposed actions issued since January 1, 1978, and between January 1, 1969, and January 1, 1971. As I am entitled to review all of the materials relied on by the FAA to support its proposed action, see 5 C.F.R.

40a

S.752.404, I request that I be given at least 20 days from the receipt of these materials to answer personally the charges.

I hereby designate Mr. Michael W. Fermon as my representative in this proposed action. Please send copies of all communications in this action to:

Mr. Michael W. Fermon
P.A.T.C.O.
1455 Veterans Highway
Hauppauge, New York 11788
Sincerely,

s/Linda J. Rose
Linda J. Rose

. 41a

APPENDIX TO DISSENTING OPINION

EXH. 3

11 August 1981

Freedom of Information Act Request
Freedom of Information Office (ATA-10)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

To Whom It May Concern:

This is to request that the Federal Aviation Administration make disclosure and provide copies of certain materials available under the Freedom of Information Act, 5 U.S.C. Section 552, and the relevant regulations of the agency.

Specifically, I request disclosure to me of records held in any form that (a) document adverse personnel action proposals and final decisions by the FAA since January 1, 1978, and from January 1, 1969, through January 1, 1971; (b) indicate how

FAA determines whether there is "reasonable cause to believe that a crime for which a sentence of imprisonment can be imposed" has been committed, within the meaning of 5 U.S.C. S.7511; (c) indicate how FAA interprets the meaning of the words "participates" and "strike" as found in 5 U.S.C. S.7311(3) and the authority for such interpretations.

The FAA has initiated disciplinary proceedings against me, and access to the materials requested above is necessary for me to prepare an adequate defense. If any portion of this request is denied, I request a detailed statement of the reasons for the withholding and an index or similar statement of the nature of the documents withheld.

Pursuant to the Act, I request waiver of all charges, but if waiver is denied, I

43a

promise to pay reasonable charges incurred for an appropriate search and copying of these documents upon presentation of an invoice along with the finished documents. If search and copying fee will exceed \$25.00, please notify my representative, Mr. Michael W. Fermon, or myself at P.A.T.C.O., 1455 Veterans Highway, Hauppauge, New York, 11788. You may notify us whether this request will be granted at the address below. I would appreciate hearing from you as soon as possible so that I may begin to prepare my defense. Thank you for your assistance.

Sincerely,

s/Linda J. Rose
Linda J. Rose

3331 Huntley Square Drive, T1
Temple Hills, Md. 20748

APPENDIX TO DISSENTING OPINION
EXH. 4

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

August 18, 1981 EASTERN REGION
 FEDERAL BUILDING
 JOHN F. KENNEDY
 INTERNATIONAL AIRPORT
 JAMAICA, NEW YORK 11430

Linda J. Rose
3331 Huntley Square Dr. T1
Temple Hills, MD 20748

Dear Ms. Rose :

My letter of August 6, 1981, informed you of a proposal to remove you from your position of Air Traffic Control Specialist, GS-2152-9/01 \$18,585 per annum at the Andrews AFB Control Tower, Camp Springs, MD. I have given full consideration to all the facts and circumstances in this case including:

- () Your written reply of _____.
() Your oral reply of _____.

- () Your written reply of _____,
and/or oral reply of _____,
to the designee, his summary and
recommendation.
- (X) You made no oral or written
reply.

I have found that all reasons and specifications cited in the proposal letter are fully supported by the evidence and warrant your removal to promote the efficiency of the service. It is my decision, therefore, that you be removed effective August 22, 1981.

The enclosures with this letter explain your rights to appeal or grieve this action, and include an Appeal/Grievance Procedure Addendum, the MSPB Appeal Form and a copy of MSPB Regulations. In this connection you should know that the FAA has filed an Unfair Labor Practice (ULP)

46a

charge against PATCO for its role in the strike and is seeking to have the Union decertified. The case is now being processed by the Federal Labor Relations Authority and a determination that PATCO committed a ULP could impact on the processing of grievances under the PATCO/FAA agreement. If the Union is decertified and the agreement terminated, this avenue of appeal may not be available to you.

Sincerely,

s/Charlesan Neugebauer
CHARLESAN NEUGEBAUER
Chief, Andrews Tower

Enclosures

APPENDIX TO DISSENTING OPINION
EXH. 5

August 19, 1981

Charlesan Neugebaur, Chief
Andrews Air Force Base Control Tower
Camp Springs, Maryland

Dear Ms. Neugebaur;

Certain individuals have received letters which indicate that your office failed to receive a timely response to your "proposed dismissal" correspondence.

The following is a copy of the individuals receipts with corresponding names as proof that the letters were sent within the seven day time parameter after receipt. The answer to the delay problem is due to slow processing in the Eastern Region of the FAA.

The individuals involved plan to have any future correspondence delivered by carrier with a receipt requested.

48a

[the following is hand written]

Received August 22, 1981 by SATCS Chriz
Matiz. Delivered by David Noble and
Robert Martinkovic

I did not respond to the attached letter
as it was received after the decision
letter was mailed.

s/[Charlesan Neugebauer]

APPENDIX TO DISSENTING OPINION
EXH. 6

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Airport Traffic
Control Tower
Andrews Air Force Base
Camp Springs, MD 20331

DATE: August 21, 1981

IN REPLY

REFER TO:

SUBJECT:

TO: Linda Rose

Your letter dated August 11, 1981 requesting additional time in which to respond to your notice of intended removal issued August 7, 1981 was received in this office on August 20, 1981.

Since substantially more than the allowed seven days had expired without any response from you, I issued the decision letter on August 18, 1981. The decision

50a

letter was forwarded to you by
first class and certified mail
August 18, 1981.

However, we have carefully con-
sidered your request and find no
reason to alter our decision.

The material relied upon to sup-
port the decision is available
for review at Andrews AFB Control
Tower, Camp Springs, Maryland.
If you wish to review this
material, please contact me.

s/Charlesan Neugebauer
CHARLESAN NEUGEBAUER
Chief, Andrews Tower

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHARLES D. POLLEY, ET AL.,
Petitioners,

v.
DEPARTMENT OF TRANSPORTATION,
FAA,
Respondent.

Appeal No. 85-1742
MSPB Docket No. DC075281F1084

DECIDED: December 9, 1986

Before RICH and DAVIS Circuit Judges, and
COWEN, Senior Circuit Judge.
PER CURIAM.

DECISION

The decisions of the Merit Systems Protection Board, affirming the peti-

tioners' removal by the Federal Aviation Administration, Department of Transportation, are affirmed.

OPINION

Counsel declined the invitation to request oral argument. We have determined on the basis of the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

This case, which involves two petitioners, was adequately handled by the presiding official. In this court they primarily assert that the agency committed harmful error in removing them. The presiding official considered this very issue

and determined that to the extent an error was committed, it was not harmful. Petitioners proffer no adequate reason why that determination should be upset. The Supreme Court decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) did not give federal employees constitutional rights not recognized below. See Linda J. Darnell (Rose), et al. v. Department of Transportation, Appeal No. 85-1578, decided by this court on November 26, 1986.

The decisions appealed from were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, were not obtained without procedures required by law, rule, or regulation having been followed, and were supported by substantial evidence. 5 U.S.C. §7703(c) (1982); see Hayes v. Department of the

54a

Navy, 727 F.2d 1535, 1537 (Fed. Cir.
1984).

85-1742

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHARLES D. POLLEY, ET AL.,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FAA,
Respondent.

Appeal No. 85-1742
MSPB Docket No. DC075281F1084

COWEN, Senior Circuit Judge, dissenting.

To the extent that this case involves the same issues that were decided November 26, 1986, in Linda J. Darnell (Rose), et al. v. Department of Transportation, Appeal No. 85-1578, I dissent for the reasons stated in my dissenting opinion in that case.

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LEROY D. ALEXANDER,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION
FAA
Respondent.

Appeal No. 85-1738
MSPB Docket Nos. DC075282F1173 &
DC075281F1173

DECIDED: December 9, 1986

Before RICH and DAVIS Circuit Judges, and
COWEN, Senior Circuit Judge.
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is affirmed.

OPINION

Counsel declined the invitation to request oral argument. We have determined on the basis of the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

Petitioner's case was adequately dealt with by the presiding official and the full Board. His version of events was

permissibly found "patently incredible," and it is settled that he was required to make greater efforts to find out his deadline and whether he could return. See Schapansky v. Department of Transportation, FAA, 735 F.2d 477 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984); Dorrance v. Department of Transportation, FAA, 735 F.2d 516 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984); Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984). In addition, the agency did not harmfully err (in the circumstances here) in its efforts to give him notice of the removal proceedings against him. See Linda J. Darnell (Rose), et al. v. Department of Transportation, Appeal No. 85-1578, decided by this court on November 26, 1986.

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. §7703(c) (1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LEROY D. ALEXANDER,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION
FAA
Respondent.

Appeal No. 85-1738
MSPB Docket Nos. DC075282F1173 &
DC075281F1173

COWEN, Senior Circuit Judge, dissenting.

To the extent that this case involves the same issues that were decided November 26, 1986, in Linda J. Darnell (Rose), et al. v. Department of Transportation, Appeal No. 85-1578, I dissent for the

61a

reasons stated in my dissenting opinion in
that case.

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PATRICK W. McCORMACK,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FAA,
Respondent.

Appeal No. 85-1763
MSPB Docket No. DC075281F1056

DECIDED: December 9, 1986

Before RICH and DAVIS Circuit Judges, and
COWEN, Senior Circuit Judge.
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the peti-

titioner's removal by the Federal Aviation Administration, Department of Transportation, is affirmed.

OPINION

Counsel declined the invitation to request oral argument. We have determined on the basis of the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

We considered the arguments of McCormack based on Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), relating to an opportunity to be heard against the identical factual situation in connection with other air control-

lers from the same facility (Andrews Air Force Base Control Tower) and fully discussed them in a published opinion in Linda J. Darnell (Rose) et al. v. Department of Transportation (Appeal No. 85-1578, decided November 26, 1986). We held that none of the arguments would justify any change in the board decision and we so hold here.

This appeal otherwise raises no issue not resolved in, and presents no fact pattern which differs significantly from that in Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984); Campbell v. Department of Transportation, FAA, 735 F.2d 497 (Fed. Cir.), cert. denied, 105 S. Ct. 247 (1984); and Novotny v. Department of Transportation, FAA, 735 F.2d 521 (Fed. Cir. 1984).

65a

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. §7703(c) (1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

85-1763

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PATRICK W. McCORMACK,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FAA,
Respondent.

Appeal No. 85-1763
MSPB Docket No. DC075281F1056

COWEN, Senior Circuit Judge, dissenting.

To the extent that this case involves the same issues that were decided November 26, 1986, in Linda J. Darnell (Rose), et al. v. Department of Transportation, Appeal No. 85-1578, I dissent for the reasons stated in my dissenting opinion in that case.

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RICHARD E. SWAUGER,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FAA
Respondent.

Appeal No. 85-1752
MSPB Docket No. DC075281F1133

DECIDED: December 9, 1986

Before RICH and DAVIS, Circuit Judges,
and COWEN, Senior Circuit Judge.
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the peti-

titioner's removal by the Federal Aviation Administration, Department of Transportation, is affirmed.

OPINION

Counsel declined the invitation to request oral argument. We have determined on the basis of the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. p.34(a).

Petitioner's case was adequately dealt with by the presiding official and the full Board. His claim of emotional incapacity was specifically considered. We cannot say that the administrative rejection of that claim was not grounded

in substantial evidence. Accordingly, we must leave that finding and conclusion undisturbed. On petitioner's claims that his constitutional rights under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), were violated, see this court's recent decision in Linda J. Darnell (Rose), et al. v. Department of Transportation, Appeal No. 85-1578, decided November 26, 1986.

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. §7703(c) (1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

RICHARD E. SWAUGER,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FAA
Respondent.

Appeal No. 85-1752
MSPB Docket No. DC075281F1133

COWEN, Senior Circuit Judge, dissenting.

To the extent that this case involves the same issues that were decided November 26, 1986, in Linda J. Darnell (Rose), et al. v. Department of Transportation, Appeal No. 85-1578, I dissent for the reasons stated in my dissenting opinion in that case.

APPENDIX B

**United States Court of Appeals
For The Federal Circuit**

Appeal No. 85-1578

LINDA J. DARNELL (ROSE), ET AL.,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). MSPB Docket Nos. DC075281F1026 and DC075281F1097. This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF
THE COURT

Dated: Nov. 26, 1986

Francis X. Gindhart,
Clerk

72a

ISSUED AS A MANDATE: Jan. 16, 1987
COSTS: Against, Petitioner.

PRINTING: \$81.12
TOTAL: \$81.12

73a

United States Court Of Appeals
For The Federal Circuit

Appeal No. 85-1742
MSPB Docket No. DC075281F1084

CHARLES D. POLLEY, ET AL.,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). MSPB Docket No. DC075281F1084. This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF
THE COURT

Dated: Dec. 9, 1986

Francis X. Gindhart,
Clerk

74a

ISSUED AS A MANDATE: Feb. 12, 1987
COSTS: Against, Petitioner.

PRINTING: \$74.72
TOTAL: \$74.72

United States Court Of Appeals
For The Federal Circuit

Appeal No. 85-1538
MSPB Docket Nos. DC075282F1173 &
DC075281F1173

LEROY D. ALEXANDER,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). DC075282F1173 and DC075281F1173. This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF
THE COURT

Dated: Dec. 9, 1986

Francis X. Gindhart,
Clerk

76a

ISSUED AS A MANDATE: Feb. 12, 1987
COSTS: Against, Petitioner.

PRINTING: \$101.60
TOTAL: \$101.60

United States Court Of Appeals
For The Federal Circuit

Appeal No. 85-1763
MSPB Docket No. DC075281F1056

PATRICK W. McCORMACK,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). MSPB Docket No. DC075281F1056. This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF
THE COURT

Dated: Dec. 9, 1986

Francis X. Gindhart,
Clerk

78a

ISSUED AS A MANDATE: Feb. 12, 1987
COSTS: Against, Petitioner.

PRINTING: \$82.40
TOTAL: \$82.40

United States Court Of Appeals
For The Federal Circuit

Appeal No. 85-1752
MSPB Docket No. DC075281F1133

RICHARD E. SWAUGER

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). DC075281F1133. This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF
THE COURT

Dated: Dec. 9, 1986

Francis X. Gindhart,
Clerk

80a

ISSUED AS A MANDATE: Feb. 12, 1987
COSTS: Against, Petitioner.

PRINTING: \$69.60
TOTAL: \$69.60

APPENDIX C

**United States Court of Appeals
For The Federal Circuit**

Appeal No. 85-1578

**LINDA J. DARNELL (ROSE), ET AL.,
Petitioners,**

v.

**DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.**

**Before RICH and DAVIS, Circuit Judges, and
COWEN, Senior Judge.**

O R D E R

**A petition for rehearing having been
filed in this case,**

**UPON CONSIDERATION THEREOF, it is
ORDERED that the petition rehearing
be, and the same hereby is, denied.**

**The suggestion for rehearing in banc
is under consideration.**

82a

FOR THE COURT

Dec. 21, 1986

Date

Francis X. Gindhart,
Clerk

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

United States Court of Appeals
For The Federal Circuit

Appeal No. 85-1578

LINDA J. DARNELL (ROSE), ET AL.,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

O R D E R

A suggestion for rehearing in banc
having been filed in this case,

UPON CONSIDERATION THEREOF, it is
ORDERED that the suggestion for
rehearing in banc is declined.

FOR THE COURT

1-16-87
Date

Francis X. Gindhart,
Clerk

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

United States Court of Appeals
For The Federal Circuit

Appeal No. 85-1742

CHARLES D. POLLEY, ET AL.,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

Before RICH and DAVIS, Circuit Judges, and
COWEN, Senior Circuit Judge.

O R D E R

A petition for rehearing having been
filed in this case,

UPON CONSIDERATION THEREOF, it is
ORDERED that the petition for
rehearing be, and the same hereby is,
denied.

The suggestion for rehearing in banc
is under consideration.

85a

FOR THE COURT

2-5-87

Date

Francis X. Gindhart,
Clerk

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

United States Court of Appeals
For The Federal Circuit

Appeal No. 85-1542

CHARLES D. POLLEY, ET AL.,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

O R D E R

A suggestion for rehearing in banc
having been filed in this case,

UPON CONSIDERATION THEREOF, it is
ORDERED that the suggestion for
rehearing in banc is declined.

FOR THE COURT

2-18-87

Date

Francis X. Gindhart,
Clerk

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

United States Court of Appeals
For The Federal Circuit

Appeal No. 85-1738

LEROY D. ALEXANDER,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

Before RICH and DAVIS, Circuit Judges, and
COWEN, Senior Circuit Judge.

O R D E R

A petition for rehearing having been
filed in this case,

UPON CONSIDERATION THEREOF, it is
ORDERED that the petition for
rehearing be, and the same hereby, is
denied.

The suggestion for rehearing in banc
is under consideration.

88a

FOR THE COURT

2-5-87

Date

Francis X. Gindhart,
Clerk

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

United States Court of Appeals
For The Federal Circuit

Appeal No. 85-1738

LEROY D. ALEXANDER,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

O R D E R

A suggestion for rehearing in banc
having been filed in this case,

UPON CONSIDERATION THEREOF, it is
ORDERED that the suggestion for
rehearing in banc is declined.

FOR THE COURT

2-18-87
Date

Francis X. Gindhart,
Clerk

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

United States Court of Appeals
For The Federal Circuit

Appeal No. 85-1763

PATRICK W. McCORMACK,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

Before RICH and DAVIS, Circuit Judges, and
COWEN, Senior Circuit Judge.

O R D E R

A petition for rehearing having been
filed in this case,

UPON CONSIDERATION THEREOF, it is
ORDERED that the petition for
rehearing be, and the same hereby is,
denied.

The suggestion for rehearing in banc
is under consideration.

91a

FOR THE COURT

2-5-87
Date

Francis X. Gindhart,
Clerk

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

United States Court of Appeals
For The Federal Circuit

Appeal No. 85-1763

PATRICK W. McCORMACK,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

O R D E R

A suggestion for rehearing in banc
having been filed in this case,

UPON CONSIDERATION THEREOF, it is
ORDERED that suggestion for rehearing
in banc is declined.

FOR THE COURT

2-18-87
Date

Francis X. Gindhart,
Clerk

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

United States Court of Appeals
For The Federal Circuit

Appeal No. 85-1752

RICHARD E. SWAUGER,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION,
Respondent.

Before RICH and DAVIS, Circuit Judges, and
COWEN, Senior Circuit Judge.

O R D E R

A petition for rehearing having been
filed in this case,

UPON CONSIDERATION THEREOF, it is
ORDERED that the petition for
rehearing be, and the same hereby, is
denied.

The suggestion for rehearing in banc
is under consideration.

94a

FOR THE COURT

2-5-87

Date

Francis X. Gindhart,
Clerk

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

United States Court of Appeals
For The Federal Circuit

Appeal No. 85-1752

RICHARD E. SWAUGER,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

O R D E R

A suggestion for rehearing in banc
having been filed in this case,
UPON CONSIDERATION THEREOF, it is
ORDERED that suggestion for rehearing
in banc is declined.

FOR THE COURT

2-18-87
Date

Francis X. Gindhart,
Clerk

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LEROY D. ALEXANDER
RICHARD D. JONES

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Docket Number
DC075281F1173
DC075281F1174

ORDER

Appellants have petitioned for review of the initial decision dated January 24, 1983, sustaining their removals from their positions as Air Traffic Control Specialists at the Andrews Air Force air traffic control facility. The agency based the removal actions on charges of participating in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918, and unauthorized

absence (AWOL).

Upon consideration of the appellants' petition, we find that the legal issues raised have been addressed and resolved by the Board,*/ and that the presiding official's findings as to those legal issues

*/With regard to the legal issues, the appellants' petition for review and the briefs submitted in support thereof are identical to those addressed and resolved by the Board in Bangerter v. Department of Transportation, MSPB Docket No. SL075281F0279 (September 27, 1983). Appellants argue that they were denied the right to reply to the agency's action because they did not receive either the notice of proposed removal or the final notice of removal. The record indicates that the agency sent the notices of proposed removal and final notices of removal by regular and certified mail to appellants' last known addresses. Appellants did not officially notify the agency of their address changes, although appellant Jones told his former supervisor, Andrew Ruth, that his address had changed in late August or early September 1981. Neither appellant had any contact with the agency, during or after the strike, to ascertain their employment status. The presiding official found that the agency's mailing of the notices to appellants' last known address was reasonable under the circumstances and did not constitute error. A showing of harmful procedural error requires the appellant to show error by the agency in the application of its procedures, and that, in the absence of cure of the error, the agency might have reached a different result. 5 U.S.C. § 7701(c)(2)(A) and Logistics Agency, 1 MSPB 489 (1980). Neither appellant has shown that the agency might have reached a different conclusion.

are essentially consistent with ours.

In addition, to the extent that the arguments made in appellants' petition relate to the presiding official's factual determinations, we find that appellants have not demonstrated any factual error by the presiding official, based on specific references to the record, sufficient to warrant the Board's full review of the record. See Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980).

Accordingly, the Board hereby DENIES the appellants' petition for review for failure to meet the criteria set forth at 5 C.F.R. § 1201.115.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision sustaining the appellants' removals shall become final five

(5) days from the date of this order. 5
C.F.R. § 1201.113(b).

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

SEP 30 1983

(Date)

Washington, D.C.

s/Robert E. Taylor

Robert E. Taylor

Secretary

100a

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PATRICK W. McCORMACK

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Docket Number
DC075281F1056

OPINION AND ORDER

Appellant was removed from his position of Air Traffic Controller Specialist, Andrews Air Force Base, Camp Springs, Maryland, based on charges of striking against the United States Government, and unauthorized absence. Appellant appealed his removal to the Board's Washington, D.C. Regional Office.

In an initial decision, dated January 20, 1983, the presiding official found that the agency had established a prima facie case of strike participation, which appellant had failed to rebut, inasmuch as appellant had admitted that he was absent without authorization on dates on which a strike against the Federal Government was in progress. The presiding official also found that the appellant's reasons for his absences failed to rebut the agency's prima facie case. Therefore, he found that the charges against the appellant had been sustained by preponderant evidence, and that removal was an appropriate penalty. Accordingly, the agency's decision to remove appellant was affirmed.

In his petition for review,^{1/} appellant contends that the presiding official erred with regard to his findings related to appellant's reasons for his absences; that the initial decision does not contain findings of fact, conclusions, or reasons as to the issue of notice as it relates to invocation of the crime exception; that he was improperly suspended during the notice period of his proposed removal; and that the presiding official should have mitigated the agency imposed penalty, as it was too harsh.

1/ Appellant's petition for review appeared to have been untimely filed and he was provided an opportunity to show good cause for waiver of the time limitation for filing a petition for review. On March 22, 1983, the Board found that inasmuch as the appellant had shown that the petition for review had been mailed prior to the date on which the initial decision would have become final, that it would be deemed timely filed.

With respect to appellant's first contention, when a petition for review challenges the factual findings of the presiding official, it must establish that the challenged factual determinations are incorrect and identify specific evidence in the record demonstrating error. Weaver v. Department of the Navy, 2 MSPB 197, 299 (1980). Appellant has not identified any specific evidence in the record indicating error in the presiding official's factual findings. Appellant's petition merely reiterates arguments that were raised and discussed below. Therefore, we find that appellant has failed to establish any basis for reversal of such findings. Id.

With respect to appellant's second and third contentions of failure by the presiding official to address the issues of invocation of the crime exception and

of improper suspension, we find that these issues were not raised in his appeal before the presiding official. The Board has consistently held that it will not consider arguments raised for the first time in the petition for review, absent new and material evidence that was unavailable at the time the record was closed. See, Epstein v. Department of Health and Human Services, 6 MSPB 203 (1981). Therefore, we will decline to give consideration to these contentions on review.^{2/}

^{2/} Even if his arguments were timely raised below, we would find no error by the agency in view of our holdings in Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 (October 29, 1982), and Martel v. Department of Transportation, MSPB Docket No. BN075281F0558 (April 25, 1983).

In support of his final contention, appellant argues that the combined and related offenses of strike participation and unauthorized absences are the only offenses reflected in his otherwise exemplary employment record, and that the sanction of removal should be mitigated. In Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 at 11 (October 28, 1982), the Board reviewed similar potentially mitigating circumstances and found them to be insufficient to warrant reduction of the removal penalty. Therefore, the Board will not disturb the removal penalty imposed by the agency in this appeal.

Accordingly, the petition for review is hereby DENIED. 5 C.F.R. § 1201.115.

This is the final order of the Merit Systems Protection Board in this appeal.

106a

The initial decision shall become final five (5) days from the date of this order.
5 C.F.R. § 1201.113(b).

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

JUN 23 1983

(Date)

Washington, D.C.

s/Robert E. Taylor

Robert E. Taylor

Secretary

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
RICHARD E. SWAUGER

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Docket Number
DC075281F1133

OPINION AND ORDER

Appellant was removed from his position of Air Traffic Control Specialist at the Washington Tower based upon charges of participation in a strike against the Government, and unauthorized absence. He appealed the removal action to the Board's Washington, D.C. Regional Office.

In an initial decision, the presiding official sustained appellant's removal. The presiding official found that the

agency had shown by preponderant evidence that appellant participated in a strike and was absent without leave, and that appellant failed to rebut this showing. The presiding official also found that the agency-imposed penalty of removal was appropriate.

In his petition for review, appellant contends that the agency failed to meet its burden of proof since the evidence demonstrates that he was too emotionally disabled to work on the dates in question. Appellant also contends that the agency: failed to show that the removal penalty was reasonable or that it would promote the efficiency of the service; wrongfully denied appellant the opportunity to make an oral reply; and unlawfully suspended appellant during the removal notice period.

Appellant asserts that the presiding official erred in finding that the agency established a prima facie case of his participation in the strike. In Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 at 6 n.2 (October 28, 1982),^{1/} the Board held that where the existence of a strike is a matter of general knowledge, the agency may establish a prima facie case of an appellant's participation in the strike by presenting evidence of his unauthorized absence from duty during the strike. We find after a review of the record that the presiding official did not err in concluding that appellant's failure to call in requesting

1/ We reject appellant's contention that Schapansky was incorrectly decided and should be reconsidered.

leave on August 4 and the inconsistencies in appellant's arguments were insufficient to rebut the agency's case.

Appellant also argues that he has rebutted the agency's prima facie showing with evidence demonstrating that he was too emotionally disabled to work on the days for which his strike participation and absence without leave are charged. The evidence indicates that appellant was spending many hours working on personnel cases for two fellow controllers, in addition to his own duties as a controller, during the summer of 1981. Appellant had become emotionally involved in these cases and his emotional condition was further affected by his mother's serious illness. Tr. at 44-45, 82, 93-94, 98-99. While working on July 27, 1981, appellant was involved in a "system error" which result-

ed in a near collision of two aircraft on intersecting runways. Tr. at 45-46. Appellant stated that his emotional problems caused him to forget one of the airplanes and that the accident was narrowly avoided when his supervisor pointed out the problem to him. Tr. at 98-100. Appellant returned to work the next day and continued working until his regular days off on August 1 through August 3, 1981. After completing the week, appellant stated that he would not return to work until he could concentrate fully. Appellant, therefore requested leave before departing work on July 31. This request, however, was denied. Appellant again requested leave on one of his regular days off but this request was also denied. During this time appellant decided that he could not return to work

because he felt he would be dangerous in the control tower. Tr. 100-102, 111. Appellant, however, did not call the facility on or after August 4, his next scheduled work day, to request leave or explain his absence because he presumed his request for leave would be denied and he would be told that he would be considered a striker if he did not report. Tr. at 108.

The presiding official found appellant's contentions unpersuasive for justifying appellant's failure to report for work as scheduled from August 4 through August 6, 1981. The presiding official first relied on appellant's failure to call the facility during the strike to explain his absence. Since appellant previously requested leave, the presiding official reasoned that appellant could

have renewed this request during the period of his absence. Initial Decision at 5. Under similar circumstances, the Board has refused to accept the assertion that reporting illness and either requesting sick leave, or appearing for administrative duty, would be more likely to be interpreted as strike support than would an appellant's complete failure to report. See Anderson v. Department of Transportation, MSPB Docket No. SL075281F0347 at 20 (April 25, 1983).

The presiding official also found that appellant's appearance at the union hall on August 6 or 7, 1981, to brief controllers on their appeal rights was inconsistent with his claim of emotional disability. The presiding official found that appellant's action indicated that appellant was not as disabled as he con-

tended he was. Initial Decision at 5-6. The record also contains other examples of logical inconsistencies which undermine appellant's contention. Appellant testified that he reported to work after the "system error" incident because he didn't want to leave his team short-handed, yet appellant failed to even phone the facility on August 4, when he knew the strike was in progress and must have known that the team would also be short-handed. Tr. at 108-110. Further, appellant stated that he did not report to work on August 4, because he felt he would be dangerous; yet he also testified that August 4, was a scheduled briefing day which did not involve controlling traffic. Tr. at 111, 113. Thus, the record clearly supports the presiding official's finding that

appellant failed to rebut the agency's prima facie case.^{2/}

Appellant contends that the combined and related offenses of strike participation and unauthorized absence are the first and only offenses reflected in his otherwise exemplary employment record with the agency and that the sanction of removal is therefore excessively harsh and should be mitigated. In Schapansky v. Department of Transportation, MSPB Docket No DA075281F1130 at 11 (October 28, 1982), the Board reviewed similar potentially mitigating circumstances and found them to be insufficient to warrant reduction of

2/ Since appellant has failed to show that he was emotionally incapacitated to perform his duties, his contentions that he was wrongfully denied sick leave under 5 C.F.R. § 630.401 and under the relevant provision of the collective bargaining agreement must be rejected.

the removal penalty. Therefore, the Board will not disturb the removal penalty imposed by the agency in this appeal.

Appellant next contends that the agency failed to show that appellant's removal would promote the efficiency of the service. In Schapansky, supra, at 11-12, the Board found that the removal of an air traffic controller for striking against the Government promotes the efficiency of the service as required under 5 C.F.R. § 7513(a), because of the clear and direct relationship between such misconduct and both the employee's ability to accomplish his duties satisfactorily and the agency's ability to fulfill its mission. Therefore, the Board finds that the removal of appellant in the present case also promotes the efficiency of the service.

Appellant next asserts that the presiding official erred in sustaining the removal because the agency denied appellant an opportunity to be heard as required under 5 U.S.C. § 7513. Appellant contends that the agency's failure to do so constituted action "not in accordance with law," requiring reversal of the agency action. In Baracco v. Department of Transportation, MSPB Docket No. DC075281F0895 at 11, 13 (April 25, 1983), the Board held that the "harmful error" standard applies to review of an agency's failure to comply with a statutory procedure provided in 5 U.S.C. § 7513. Under this standard, appellant must show by a preponderance of the evidence that the procedural error likely had a harmful effect upon the outcome of the adverse action before the agency. See 5 C.F.R. § 1201.56(c)(3).

See also Parker v. Defense Logistics Agency, 1 MSPB 489, 492-93 (1980).

The record in this case shows that appellant has failed to meet this burden of proof. The agency issued its notice of proposed removal, which was signed by appellant's chief at the Washington tower, on August 6, 1981. Appellant responded on August 11, requesting an extension of time. Appellant, however, sent this request to the agency's regional offices in New York rather than to the Washington tower chief. Agency File Tabs 4 and 5. While appellant's request was timely received by the agency in New York, it was not received by the Washington chief until August 24. Since the chief had not heard from appellant at the expiration of the notice period, he issued the removal letter on August 19. Upon receiving appellee's response, the chief issued a final notice of proposed removal on August 24.

lant's request, the tower chief issued another letter informing appellant that upon consideration of the request, the agency found no reason to alter its decision of August 19. Agency File Tab 5. These facts show that appellant, admittedly experienced in personnel matters, contributed to the confusion by sending his request to New York, rather to his facility chief. Further, the agency has shown that it considered appellant's request when it was received by the appropriate official. Thus, appellant has failed to establish that the agency committed harmful procedural error in denying his request.

Accordingly, appellant's petition for review is hereby DENIED.^{3/}

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W.,

3/ Appellant's contentions that the agency's proposed removal improperly afforded him less than seven days to respond, and that he was in effect suspended without procedural safeguards during the notice period are without merit. Baracco v. Department of Transportation, MSPB Docket No. DC075281F08-95 at 8-9 (April 25, 1983); Martel v. Department of Transportation, MSPB Docket No. BN075281F0558, at 6-7, 11-12 (April 25, 1983).

121a

Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

SEP 16 1983

(Date)

Washington, D.C.

s/Robert E. Taylor

Robert E. Taylor

Secretary

APPENDIX E

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON OFFICE

LINDA J. DARNELL (ROSE), ET AL.,

v.

FEDERAL AVIATION ADMINISTRATION,

CASE NO(S). DC075281F1026 & DC075281F1097
DATE: January 21, 1983

INTRODUCTION

Appellants filed appeals from the agency's actions removing them from the position of Air Traffic Control Specialist.

JURISDICTION

The actions appealed were effected under subpart D of Part 752 of the Office

of Personnel Management regulations, which was promulgated pursuant to OPM's authority under 5 U.S.C. §7514. The record reflects that appellants were covered employees as defined by subpart D, and were entitled to appeal these actions to the Board. See 5 U.S.C. §§ 7511(a)(1)(A), 7512, 7513(d); 5 C.F.R. §§ 752.401(a), 752.401(b)(1), 752.405(a). I therefore find that the appeals are properly before the Board for adjudication.

ANALYSIS AND FINDINGS

The agency proposed appellants' removals on the basis of two charges: (1) participation in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918; and (2) unauthorized absence. Both charges stem from appellants' failure to report

for duty on various dates in August of 1981.

The Board has taken official notice of the fact that members of the Professional Air Traffic Controllers Organization (PATCO) engaged in an illegal strike against the Federal Government from August 3, 1981 through at least August 6, 1981.

Ketchem v. Department of Transportation, MSPB Docket No. DA075281F0713 (5/28/82). In addition, the Board has found that an employee's unauthorized absence during the period of such a strike may constitute a *prima facie* case of said employee's participation therein. Schapanksy v. Department of Transportation, MSPB Docket No. DA075281F1130 (10/28/82); Jones v. Tennessee Valley Authority, MSPB Docket No. AT07528010300 (2/19/82); Ducket and Yardley v. Tennessee Valley Authority, MSPB Docket No. AT07528010325 (2/19/82).

Striking has been defined as the "actual refusal in concert with others to provide services to one's employer." United Federation of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C.), affirmed, 404 U.S. 802 (1971). In Ketchem, supra at page 9, the Board stated that where an employee is charged with participation in the PATCO strike "on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that a strike was in fact in progress on the date charged, and that the employee could have returned to work on the date." In this regard, the agency presented the testimony of an operations specialist, as well as photographs of picketers, and letters from Robert Poli, then President of PATCO national, all of which show that picketing and other "strike activities" continued to occur on

and after August 10, 1981. In addition, the Tower Chief testified that Mr. Martinkovic would have been allowed to return to duty on August 10, 1981, the date of his "deadline shift" (the first regularly scheduled shift after 11:00 a.m. on August 5, 1981). With respect to Ms. Rose, her proposal notice was issued on August 6, 1981, and all of the dates covered in the agency's charges against her fall within the period of official notice cited above. I therefore find that the agency has met its burden to show that the strike was in existence at all times relevant to the charges against both employees.

In support of its charges, the agency presented the testimony of the Tower Chief, Ms. Charlesan Neugebauer, as well as watch schedules and time and attendance

records, to establish that each of the appellants was absent without authorization on one or more days during the strike, and that each failed to report for his or her "deadline shift". I find this evidence to be sufficient to establish a *prima facie* case of strike participation with respect to each of the appellants. In light of this finding, the burden of persuasion now shifts to each appellant to show that he or she "had no knowledge of the existence of the strike or to demonstrate that his [or her] absence was due to some factor other than intentional participation in the strike." Schapansky, supra at 6. Mr. Martinkovic was on approved annual leave or regular days off from sometime in July of 1981 through August 9, 1981. The agency's charges against him deal only with his failure to report for

duty at 3:54 p.m. on August 10, 1981. Mr. Martinkovic testified that he was vacationing in Connecticut when the strike began and that he heard President Reagan's speech giving striking controllers 48 hours to return to duty or be fired. He further testified that he did not report to duty on August 10, 1981 because he believed that he had already been fired on August 5, 1981 by virtue of his failure to return to his duty station. However, when questioned regarding his thoughts upon hearing the President's August 3, 1981 speech, he testified that he wasn't worried because he was on approved annual leave all week. This is in direct conflict with his prior statement that he believed that he had to report by August 5, 1981. Moreover, when asked why, if he had any doubts regarding his status that week, he

did not contact the facility to verify or clarify said status, his response was "I don't know". I also note that his written reply contains no allegation that he was fired on August 5, 1981, but rather sets forth a totally different claim. In light of his numerous conflicting statements, as well as his evasive answers and demeanor during cross examination, I find Mr. Martinkovic to be incredible. I therefore find that his unauthorized absence on August 10, 1981 was not due to any honest belief that he had already been fired.

In his closing statement at the hearing before me, Ms. Rose's representative presented the argument that Ms. Rose did not report for duty because there was an armed guard at the door to the tower. However, Ms. Rose raised no such allegation in her reply to the proposal notice

or in her appeal to the Board. Moreover, she did not testify at the hearing, or otherwise present evidence that the presence of a guard had anything to do with her failure to report for duty on and after August 4, 1981.

I find that the agency has established a prima facie case of strike participation with respect to both of the appellants, and that neither of them has presented persuasive evidence in rebuttal. The same evidence establishes that appellants were absent without authorization, as alleged. I therefore find that the charges as set forth in the proposal notices are supported by a preponderance of the evidence, and are sustained.

Appellants raise several procedural arguments. In this regard, they bear the burden of proving error by the agency in

the application of its procedures, and that said error was harmful. 5 U.S.C. §7701 (c)(2)(A); 5 C.F.R. §1201.56(b) (1). They must show that in the absence or cure of such error, the agency might have reached a different conclusion. 5 C.F.R. §1201.56(c)(3); Parker v. Defense Logistics Agency, 1 MSPB 482 (1980).

Appellants allege that the agency's decisions were defective in that they were based upon appellants' failure to reply to the proposal notices when, in fact, they did submit written replies. In this regard, both appellants mailed their written replies to the agency's Regional Office rather than to their facility. As a result, the replies were not received by the deciding official at the facility until after she had issued the final decisions. Each decision letter did note that

the employee had made no written or oral reply. However, I find that such statement was not intented (sic) to, and in fact did not, constitute an additional "reason" for the decision or the action. Moreover, the Tower Chief reviewed the replies when they were finally received, and determined that there was nothing in them which would alter her decisions. I agree. In the absence of a likelihood that the agency would have reached a different conclusion, any error with respect to the late receipt of appellants' replies was harmless. Messersmith v. General Services Administration, MSPB Docket No. DC07528010253 (12/2/81).

Although not truly articulated in the context of procedural error, Mr. Martinkovic alleged that his proposal notice was issued prior to the starting

time of his "deadline shift". In this regard, appellant's representative submitted a copy of a receipt (Appellants (sic) Ex. 1) for the mailing of the certified mail copy of appellant's proposal notice which, although partially obscured by a date stamp, appears to show a time of "1410" or 2:10 p.m. However, Ms. Neugebauer testified that the notice was not in fact mailed until after appellant had failed to appear for his shift at 3:54 p.m.' In light of the lack of clarity of the document, as well as Ms. Neugebauer's testimony, I am not persuaded that the notice was, in fact, mailed prior to the start of the shift. Moreover, even assuming that it was mailed early, appellant did not receive it until August 12, 1981. Its issuance therefore had no effect upon appellant's ability or inclination to

report for duty on August 10, 1981. I therefore find that appellant could not have been prejudiced by such a minimally premature issuance, and any error in this regard would have been harmless.

Unauthorized absence, by its very nature, disrupts the efficiency of the service. Chiaverini v. United States, 157 Ct. Cl. 371 (1962); Desiderio v. Department of the Navy, 4 MSPB 171 (1980). As cited by the agency, strike participation by a Federal employee is violative of both civil and criminal statutes. 5 U.S.C. §7311(3) provides that an individual may not hold a position in the Federal Government if he participates in a strike. This has been held to establish removal as the mandatory penalty for strike participation. American Postal Workers Union v. United States Postal Service, 628 F.2d

1280 (9th Cir. 1982). In Schapansky, supra, the Board did not answer the question as to whether it had authority to mitigate what appears to be a statutorily mandated penalty. Rather, the Board found that in light of the nature and gravity of the offense of striking, as well as the direct, deleterious effects such conduct has on the efficiency of the service, mitigation of the penalty would not be warranted under the standards set forth in Douglas v. Veterans Administration, MSPB Docket No. AT075299006 (4/10/81). I therefore find that the agency's penalty selections in these cases were both reasonable and appropriate.

In summary, I find that the agency effected appellants' removals for such cause as will promote the efficiency of the services. 5 U.S.C. §7513(a).

136a

DECISION

The agency's actions are hereby affirmed.

NOTICE

This is an initial decision and will become a final decision of the Merit Systems Protection Board on February 25, 1983 unless a petition for review is filed with the Board.

Any petition for review must be filed with the Board within thirty-five (35) calendar days after the issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management (OPM) and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review only if he or

she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule or regulation under the jurisdiction of OPM. 5 U.S.C. §7701(e)(2). The petition must specifically identify the exception taken to this decision, cite the basis for exception, and refer to applicable law, rule or regulation.

The petition for review must be filed with the Office of the Secretary, Merit Systems Protection Board, Washington, D.C. 20419 no later than thirty-five (35) calendar days after issuance of this decision. If a petition for review is filed, an informational copy of it should be forwarded to this office.

The Board may grant a petition for review when a party submits written argu-

ment and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. §7703(b)(1)*/, an appellant has the right to seek judicial review of the Board's final decision in this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit no later than 30 days after appellant's receipt of the Board's final order or decision.

*/ As modified by §127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. §1295(a)(9).

139a

For the Board:

s/Joseph E. Clancy
Joseph E. Clancy
Presiding Official

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DAVID F. GARDNER
WILLIAM HILDEBRAND
CHARLES D. POLLEY
DONALD T. SHANKLE
GARY W. SOULIER

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION,

CASE NOS. DC075281F0965,
DC075281F0988, DC075281F1084,
DC075281F1107, DC075281F1119
DATE: January 13, 1983

INTRODUCTION

The appellants filed appeals^{1/} from action taken by the Federal Aviation

1/ Appellants Gardner, Hildebrand, Polley, Shankle, and Soulier filed appeals on September 10, 15, 14, 15, and 10, 1981, respectively.

Administration removing them from their positions of Air Traffic Control Specialists for their involvement in a strike against the Government of the United States and for absence without leave (AWOL).

JURISDICTION

Section 7513 (d) and 7701 (a) of Title 5 U.S.C., permit employees to appeal to the Board from agency action involving a removal. I find that the appellants held positions in the competitive service at the time the agency proposed their removal and that they were not serving a probationary period. I find, therefore, that these appeals are properly before the Board. 5 U.S.C. Section 7511 (a).

BACKGROUND^{2/}

Mr. Harry T. Hubbard, Chief, Washington Tower (Washington National Airport), advised the appellants on various days in August, 1981, that he was proposing their removal from their positions of Air Traffic Control Specialists for two reasons. The first involved an alleged violation of 5 U.S.C 7311, which provides that "(a)n individual may not accept or hold a position in the Govern-

2/ These appeals were initially consolidated for hearing and styled as Richard W. Swauger, et al. At that time, I expected to provide the appellants' individual opinions on their appeals. However, since none of the appellants testified and since the issue raised by them in their written submissions and through the representations of their representative are identical, it would serve no useful purpose to provide individual opinions. Therefore, I am consolidating these appeals for purposes of a decision thereon, except for an opinion in the case of Richard E. Swauger which will be issued separately. In this connection, transcripts of the hearing are listed under the name of appellant Swauger.

ment of the United States . . . if he . . . participates in a strike . . . against the Government of the United States." Section 1918 of Title 18, U.S.C., was also cited and the appellants were also told that it makes participation in a strike against the United States a crime for which "a sentence of imprisonment can be imposed." The appellants were told that "(b)eginning at approximately 7 a.m. . . . on August 3, 1981, a nationwide strike by air traffic controllers occurred" and that beginning on August 3, 1981, for appellants Polley, Soulier, and Shankle, and beginning on August 4, 1981, for appellants Gardner and Hildebrand, "when [they] failed to report for duty, until the present, [they] participated in a strike against the United States Government." The second reason for appellants'

removal involved an alleged unauthorized absence. The notice continued that the appellants failed to report for their scheduled tour of duty commencing on the days indicated supra. The appellants were reminded that they were sent a telegram on August 3, 1981 advising them "that an illegal strike was in progress, and that [they] must return to duty for [their] regularly scheduled shift." The notice concluded that the appellants failed to return to duty and "instead remained absent without authorization.

After setting forth the foregoing facts, Mr. Hubbard concluded that he had reasonable cause to believe that the appellants had committed a crime for which a sentence of imprisonment could be imposed and that he, accordingly, was affording them an opportunity to "reply to this

notice personally, in writing, or both, and furnish affidavits and other documentary evidence in support of [their] answer, within seven calendar days after [they] receive[d] this letter."

On August 11, 1981, the appellants, in response to Mr. Hubbard's notice of proposed removal, wrote Mr. Hubbard at the Eastern Regional Office of the Federal Aviation Administration, Jamaica, New York, rather than to the Washington National Airport office, to request an extension of time for filing a written answer.^{3/} The appellants went on to state that they considered no basis existed for the charge that they committed a crime for

^{3/} I note that appellant Shankle's letter requesting an extension is not dated. However, the notation "8/22/81, 10:30 a.m." is indicated in the top right hand corner.

which a sentence of imprisonment could be imposed. Consequently, the appellants argued, the agency was required to afford appellants a reasonable period of time within which to respond.

Additionally, by separate letter also dated August 11, 1981, the appellants filed a Freedom of Information Act request seeking to have the agency disclose certain documents relating to its conclusions in the notice of proposed removal and without which the appellants represented they could not properly defend the action.

In each instance, appellants' letter were received by Mr. Hubbard after he issued final notices removing them from

their positions.^{4/} On the same day that he received the letters, Mr. Hubbards denied appellants' request for an extension of time, stating that any response to the notice of proposed removal had to be made in accordance therewith.

By letters dated as previously indicated,^{5/} Mr. Hubbard advised the appellants that he [Mr. Hubbard] found "all reasons and specifications cited in the proposal letter" supported by the evi-

4/ Appellants Gardner's letter was received on August 20, three days after his decision notice dated August 17; appellant Hildebrand's letter was received on August 24, five days after his decision notice dated August 19; appellant Polley's letter was received on August 21, two days after his decision notice dated August 19; appellant Shankle's letter was received on August 24, six days after his decision notice dated August 18; and appellant Soulier's letter was received on August 21, four days after his decision notice dated August 17.

5/ Id.

dence, thus warranting appellants' removal from their positions to promote the efficiency of the service. In so doing, Mr. Hubbard advised the appellants that they "made no oral or written reply" to the notice of proposed removal. These appeals followed.

ANALYSIS AND FINDINGS

In order for the agency decision removing the appellants to be sustained on appeal to the Board, the agency must demonstrate that the action is supported by a preponderance of the evidence. 5 U.S.C. 7701 (c) (1) (B); 5 C.F.R. 1201.56 (a) (ii). The Board's regulations define the phrase "preponderance of the evidence" to mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as suffi-

cient to support a conclusion that the matter asserted is more likely to be true than not true." 5 C.F.R. 1201.56 (c) (2). In Ketchem v. Department of Transportation, MSPB Docket No. DA075281F0713 (May 28, 1982), the Board found, and took official notice of the fact, that the Professional Air Traffic Controllers Organization (hereinafter referred to as PATCO) called for an unlawful strike by air traffic controllers and that such strike "commenced on August 3, 1981, and was still in progress on August 6, 1981," Id., at 9. Since the appellants presented no evidence to refute this finding, I, too, will take official notice that the PATCO strike commenced on August 3, and continued, at least, through August 6, 1981.

In the foregoing connection, I find that the President gave the striking controllers a 48-hour grace period commencing 11 a.m., August 3, 1981, to return to their jobs. See 17 Weekly Comp. Pres. Doc. 845 (1981). I further find that the agency, in implementing President Reagan's ultimatum to return to work, interpreted the President's directive to mean that striking controllers could report to work on their first scheduled shift after the expiration of the 48-hour grace period. See United States v. PATCO, 524 F. Supp. 160, 164 (D.D.C. 1981).

I find that appellants' deadline date fell within the official notice period, except for appellant Polley whose deadline was August 7, 1981, 6:48 a.m. With respect to appellant Polley, the Board stated in Ketchum, supra, that "where an employee

like the appellant is charged with participation in a strike on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that a strike was in fact in progress on the date charged, and that the appellant could have returned to work on that date.

Ketchum v. Department of Transportation,
MSPB Docket No. DA075281F0713, p. 9.

Mr. Hubbard testified that the conditions existing at his facility on August 3, 1981, continued through August 7, and well beyond that date. Specifically, Mr. Hubbard testified that he arrived at his facility early on the morning of August 3, and observed controllers milling about. Mr. Hubbard continued that, since he had been advised of the possibility of a PATCO strike, he had developed a contingency plan, which included, inter alia, the

utilization of operational team supervisors as controllers, keeping supervisors on overtime and reducing air traffic. Mr. Hubbard added that his staff handled 50% to 60% of normal air traffic on August 3, 1981. The contingency plan also included the imposition of 24 hour police guards and requiring individuals entering the control tower to display ID cards.

Mr. Hubbard further testified that he observed picketing on August 4, 1981, by individuals, some of whom he recognized as his controllers. The picketing, continued Mr. Hubbard, occurred on Jefferson Davis Highway, commonly referred to as U.S. Route 1, near an access ramp to the airport.

The agency also submitted documentary evidence in support of its view that the PATCO strike was in progress on August 7,

1981. Included therein were two documents titled "Presidential Update," dated September 25, and October 8, 1981, respectively, and which contained the purported signature of Robert E. Poli, President, PATCO, in which he represents the strike to be continuing as of the date of each particular document. See Appeal File of Charles D. Polley, Tab 3. The agency also submitted orders issued by the United States District Court for the Eastern District of Virginia in civil actions filed by the United States against PATCO, containing dates ranging from August 3, 1981, through January, 1982. Again, implicit in the issuance of each order is a finding that the strike called by PATCO continued in existence as of the date of each respective order.

I find that the appellants were briefed in June, 1981, about the import of 18 U.S.C. Section 1918, which proscribes an individual from holding a position in the United States Government who "participates in a strike, or asserts the right to strike, against the Government of the United States." 18 U.S.C. Section 1918 (3). The record also contains a facsimile of a telegram sent to the appellants wherein each was advised that an illegal strike was in progress, participation could result in severe disciplinary action and that an unauthorized absence indicates participation and that controllers like the appellants were to report to duty at their next regularly scheduled shift. Mr. Hubbard testified that since the appellants did not return to duty at their scheduled time, nor did any make an

attempt to call or otherwise contact the agency, he concluded that the appellants had "joined a group of other people in an action . . . to strike against the United States Government."

In Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 (October 28, 1982), the Board noted that an agency "may establish a prima facie case of an employee's voluntary participation [in a strike] by presenting evidence of his unauthorized absence from duty during the strike." Id., at 6 n.2. This, the agency has done.

I find that the agency has made a prima facie showing that the appellants did participate in a strike against the Government of the United States. Duckett and Yardley v. Tennessee Valley Authority, MSPB Docket No. AT07528010325 (February

19, 1982) and Jones v. Tennessee Valley Authority, MSPB Docket No. AT075281010300 (February 19, 1982). I further find that the appellants were aware of the action called by PATCO, the agency's knowledge of it, and the consequences which would result from their failure to report to work, as they were so instructed to do. I find, accordingly, that the agency has demonstrated that the appellants were active strike participants.

As indicated supra, neither appellant testified and thus presented no direct evidence in rebuttal of the agency's prima facie case of strike participation by each of them. In his closing argument, appellee

lants' representative^{6/} made reference to these appellants and certain facts which were peculiar to each of them, i.e., for appellant Gardner who was not due to report back until August 5, 1981, at 2:48 p.m., appellants' representative indicated that August 4 was a briefing day for appellant Gardner. Similar references were made with respect to the other appellants but none of them served to explain or otherwise justify appellants' failure to report to duty by their deadline shift, or to demonstrate that their absences were due to some factor other than intentional

6/ Appellants' representative was Mr. Richard E. Swauger, a fired air traffic controller, whose appeal to the Board was consolidated with those of these appellants. Substantially all of the direct evidence presented at the hearing related to Mr. Swauger's appeal, including the testimony of the witnesses and the documents introduced by him.

participation in the strike. Schapansky, supra, p.6 n.2.

In the petition of appeal filed by each appellant, I note that their response to the question "Why do you think the agency was wrong in taking this action?", were identical, as reflected by Attachment 1 to their petition. I find listed there eight separate contentions, which, after my review, I have narrowed to six.

Appellants contend, first, that there was no meaningful opportunity for a hearing nor was there sufficient notice of their dismissal. These arguments are based, apparently, on the fact that the agency construed striking to be a crime against the United States, see 18 U.S.C. Section 1918, and, relying on 5 U.S.C. Section 7513 (b), reduced the normal 30 day advance written notice period to

seven. The Board has laid this argument to rest. In Schapansky v. Department of Transportation, MSPB Docket No. DA075281-F1130 (October 28, 1982), a case involving an air traffic controller fired for participating in the same strike that the appellants here are charged with having participated in, the Board, after discussing pertinent law, concluded that "the agency had reasonable cause to believe that the appellant committed a crime for which a sentence of imprisonment might be imposed" and that, consequently, its "invocation of 5 U.S.C. Section 7513 (b) (1) was justified." Id., at 8. I will give no further consideration to appellants' contention.

The appellants argue next that the agency failed to grant them access to documents and information relied on by it

in removing them and that the agency denied them access to materials necessary to present a defense. The arguments are based, apparently, on the fact that the letters dated August 11, 1981, requesting (1) an extension of time and (2) information allegedly covered by the Freedom of Information Act, were received by Mr. Hubbard after he issued final decisions removing the appellants from their positions. Specifically, the notices of proposed removal advised the appellants that they could "reply to this notice personally, in writing, or both, and furnish affidavits and other documentary evidence in support of" their answer to Mr. Hubbard. The notices were written on stationery of the Eastern Region, which is headquartered in Jamaica, New York. I find that it was error for the agency not to have been more

explicit with respect to where the appellants should have directed their reply. While I note that the agency has argued in similar appeals that the appellants were fully aware of where Mr. Hubbard was located, i.e., Washington National Airport, the notices of proposed removal specifically directed the appellants to direct their reply to Mr. Hubbard which reply was apparently to be sent to the Eastern Regional Office in New York. The fact that the agency's directive resulted in its receiving appellants' letters of August 11 well after the expiration of the time in which it directed the appellants to reply was certainly error.

The question becomes whether the error was harmful. The Board's regulations define harmful error to mean:

Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

5 C.F.R. 1201.56 (c) (3).

I find no evidence that the appellants were substantially harmed by the circuitous route their letters of August

11, 1981, reached Mr. Hubbard.^{7/} The appellants knew upon receipt of their notices that they had seven days to reply and, while each acted expeditiously in responding to their proposed removal notices, the appellants chose to request an extension of time and to argue the merits of the shortened notice period, rather than the merits of the removal action. The appellants have not demon-

7/ In his closing statement, appellants' counsel averred that the letters were not mailed to New York but rather they were hand carried to Mr. Hubbard, apparently hand delivered to him at Washington National. The record, however, does not support this statement. The appeal file submitted by the agency in the case of each appellant contains not only the letters sent by them, but also a copy of the envelopes in which the letters were mailed. Each envelope contained a certified mail stamp and number as well as a post office cancellation stamp, which, included herein, is a date on which the letters were mailed. Accordingly, I find no evidence that these letters were hand delivered to Mr. Hubbard, at least not before their receipt in New York.

strated that, had their letters reached Mr. Hubbard within a reasonable period of time, Mr. Hubbard would have (1) granted the extension and/or (2) accepted their arguments on the alleged misapplication of the shortened notice provision. Neither argument served to explain appellants' absence from duty during the period of the shift. Moreover, while I note that the final decision letters issued by Mr. Hubbard reflect that the appellants made "no oral or written reply," it is not clear whether the decision to remove was based solely on this fact. The appellants have the burden in this regard, however, and they have offered no evidence to enable me to conclude one way or the other. Nor, based on what the appellants have presented in support of their appeals, have they shown that, had Mr. Hubbard

considered these same arguments, he would have been persuaded to reach a conclusion different than the one reached by him sustaining the proposed decisions removing the appellants. Accordingly, I find that the appellants have not satisfied their burden under 5 C.F.R. 1201.56 (c) (3).

The appellants also contend that there was no proof of their participation in a strike and that their dismissals constituted a prohibited personnel practice. With respect to this latter argument, I note that the burden is on the appellants to establish this affirmative defense. 5 C.F.R. 1201.56 (b) (2). The appellants have offered no evidence in this regard and I will give this argument no further consideration. With respect to the appellants' contention that the agency has not demonstrated that they partici-

pated in a strike, I find this argument to be mooted by my findings that the agency has made a prima facie showing on this issue.

Finally, the appellants argue that the facts and circumstances of their case have not been considered on their individual merits. No evidence was presented to substantiate this claim. I note that one purpose of an appeal to the Board is to allow the appellants the opportunity, which, in this instance, is a statutory right, to cause the agency to prove its case against them by a preponderance of the evidence. That has been done here and I would note that it has been done with respect to each individual appellant. With respect to any defenses an appellant may have to rebut an agency's case, the burden lies with him and it is incumbent

on each appellant to present to this Board whatever information the appellant believes should be considered by myself in arriving at a decision on his appeal.

The agency also charged the appellants with being AWOL for the same days on which they failed to report to work during the period of the strike. Since I have found the first charge that the appellants were engaged in a strike against the Government of the United States supported by the evidence, I also find the respective charges of AWOL equally supported.

The appellant also argued that the penalty of removal is inappropriate. This argument, too, was laid to rest by Schapansky, supra, where the Board stated that "5 U.S.C. Section 7311 can be read to require removal as the mandatory penalty for individual federal employees against

whom charges of striking are sustained." Schapansky, supra, at 9. The Board went on to conclude that, even if mitigation of the penalty of removal is not foreclosed under Section 7311 (3), supra, and in light of the nature and seriousness of the offense of striking and an employee's involvement therein, the "agency's imposition of a penalty of removal cannot be deemed clearly excessive or disproportionate to a sustained charge of striking against the agency." Id., at 9, 11.

I find, therefore, the agency's charges that the appellants were involved in a strike against the Government of the United States and that they were AWOL supported by a preponderance of the evidence, and I further find that the penalty of removal was reasonable and is for such cause as will promote the efficiency of

the service. Hampton v. Young, 568 F.2d 1253, 1262, 1264 (7th Cir. 1977); Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 (October 28, 1982), pp. 11-12.

DECISION

The agency action removing the appellants is hereby affirmed.

s/William L. Garrett
William L. Garrett
Presiding Official

Notice

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 22, 1983 unless a petition for review is filed with the Board.

* * *

170a

For the Board:

s/ William L. Garrett
William L. Garrett
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

LEROY D. ALEXANDER
RICHARD D. JONES

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

CASE NOS. DC075281F1173
and DC075281F1174
DATE: January 24, 1983

INTRODUCTION

Appellants filed appeals in April of 1982 from the agency's actions removing them from the position of Air Traffic Control Specialist, GS-12, effective August 22, 1981.

JURISDICTION

The actions appealed were effected under subpart D of Part 752 of the Office of

Personnel Management regulations, which was promulgated pursuant to OPM's authority under 5 U.S.C. §7514. The record reflects that appellants were covered employees as defined by subpart D, and were entitled to appeal these actions to the Board. See 5 U.S.C. §§7511(a)(1)(A), 7512, 7513(d); 5 C.F.R. §§752.401(a), 752.401(b)(1), 752.405(a). As will be discussed further below, appellants have shown good cause for waiver of the time limit for appeal. 5 C.F.R. §§ 1201.12, 1201.22(b). I therefore find that the appeals are properly before the Board for adjudication.

ANALYSIS AND FINDINGS

By letters dated August 6, 1981, the agency proposed appellants' removals on the basis of two charges: (1) participa-

tion in a strike against the United States Government in violation of 5 U.S.C. §7311 and 18 U.S.C. §1918; and (2) unauthorized absence. Both charges stem from appellants' failure to report for duty on and/or after August 3, 1981.

The agency sent the August 6, 1981 proposal notices to appellants' last-known addresses by regular and certified mail. On August 18, 1981, having received no response from either appellant, the agency issued final decisions, also by regular and certified mail, which stated that the charges as set forth in the proposal notices were sustained, and warranted appellants' removals. Seven of the eight letters mailed to appellants were subsequently returned to the agency marked "Moved, left no address" or "Unclaimed". The only letter which was not returned to

the agency was the regular-mail copy of Mr. Jones' August 18, 1981 final decision. At the hearing before me, both appellants denied receiving any letters from the agency.

Mr. Richard Swauger testified that appellants contacted him sometime within the first two weeks of September, 1981. Mr. Swauger was, at that time, representing numerous people in their appeals to the Board. He further testified that on October 1, 1981, he delivered a letter (attached to the April, 1982 appeals) to the Board's Washington Regional Office indicating appellants' desire to appeal any actions which might have been taken against them. Although this office has no record of receiving such a letter, I find no reason to doubt Mr. Swauger's testimony that he did attempt to appeal on behalf of

the appellants on October 1, 1981. Appellants' time limit for appeal expired on September 11, 1981. However, given the fact that neither had received a final decision informing him of his right to appeal or the applicable time limit, I find that appellants were reasonably diligent in ascertaining and attempting to pursue, through Mr. Swauger, their right of appeal to the Board. Moreover, the agency has not shown that it was prejudiced by the untimely filings. I therefore find that good cause has been shown for waiver of the time limit for appeal.

Alonzo v.. Department of the Air Force, 4 MSPB 262 (1980).

The Board has taken official notice of the fact that members of the Professional Air Traffic Controllers Organization (PATCO) engaged in an illegal strike against the

Federal Goverment from August 3, 1981 through at least August 6, 1981. Ketchem v. Department of Transportation, MSPB Docket No. DA075281F0713 (5/28/82). In addition, the Board has found that an employee's unauthorized absence during the period of such a strike may constitute a *prima facie* case of said employee's participation therein. Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 (10/28/82); Jones v. Tennessee Valley Authority, MSPB Docket No. AT07528010300 (2/19/82); Ducket and Yardley v. Tennessee Valley Authority, MSPB Docket No. AT07528010325 (2/19/82).

The agency presented the testimony of the Tower Chief and documentary evidence (watch schedules, sign-on logs and time and attendance records) to establish that each of the appellants was absent without

authorization during the period of the strike, and that each failed to report for his "deadline shift" the first regularly scheduled shift after 11:00 a.m. on August 5, 1981). I find this evidence to be sufficient to establish a *prima facie* case of strike participation with respect to both of the appellants. In light of this finding, the burden of persuasion now shifts to each appellant to show that he "had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than intentional participation in the strike." Schapansky, supra at 6.

Mr. Jones was scheduled to report for duty at 8:00 a.m. on August 3, 4, 5 & 6, 1981. He did not report for these, nor any subsequent shifts, and did not otherwise contact the agency regarding his absences.

Mr. Jones did testify during the "timeliness" portion of the bifurcated hearing before me. However, he absented himself during the "merits" portion of the hearing. In his petition for appeal, appellant stated that he did not report for his shift on August 6, 1981 because he believed that anyone who had not reported by 11:00 a.m. on August 5, 1981 had been fired. However, even assuming that he had such a belief at the time, he has neither alleged, nor shown, that he had any intention or desire to return to duty at any time. I therefore find that he has failed to show that his absences were due to anything other than intentional participation in the strike.

With respect to Mr. Alexander, there is no dispute that at the time the strike began, he was in Chicago, Illinois in connection

with a Familiarization (FAM) Trip. He was scheduled to return to the Washington, D.C. area on a FAM flight on August 5, 1981, and had a regularly scheduled shift at 8:00 a.m. on August 6, 1981. Appellant claims on August 4 or 5, 1981 he learned that his FAM flight had been cancelled by United Airline. He also testified that he was afraid to fly because of the strike and the attendant reduction in the number of persons controlling air traffic. He testified that he had to borrow money and was unable to get a train home until August 6, 1981, arriving back in Washington, D.C. sometime on August 7, 1981. He then called a friend who informed him that she had called the facility on August 6, 1981 and had been told by some unidentified person that appellant no longer worked there. He testified that he

had no reason to doubt his friend's word, and therefore assumed that he had been fired.

Mr. Alexander's story is patently incredible. He presented no reason why, upon learning that his FAM flight had been cancelled, he did not immediately contact his facility to request further instructions, or to even inform the agency that he would not be reporting for duty on August 6, 1981. In addition, no reasonable person would assume that he had been fired based upon a friend's statement that some anonymous person had said that he no longer worked there. Moreover, on cross-examination, appellant admitted that he attended "gatherings" with PATCO members at the airport in Chicago. Appellant's failure to contact the agency at any time on or after August 5, 1981 to either

request leave or even determine his status, leads me to find that his unauthorized absence was not due to any factor other than voluntary participation in the strike.

I find that the agency has established a prima facie case of strike participation with respect to both appellants, and that neither of them has presented persuasive evidence in rebuttal. The same evidence establishes that appellants were absent without authorization, as alleged. I therefore find that the charges as set forth in the proposal notices are supported by a preponderance of the evidence, and are sustained.

Appellants claim that they were denied the right to reply to the agency's proposed actions, and that this constituted harmful procedural error. In this regard, they

must show error by the agency in the application of its procedures, and that, in the absence or cure of the error, the agency might have reached a different conclusion. 5 U.S.C. §7701(c)(2)(A); 5 C.F.R. §1201.56(b)(1). Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). However, appellants' non-receipt of the proposal notices was the result of their own failure to inform the agency of their correct addresses. The agency's mailing of the notices to appellants' last known addresses was reasonable under the circumstances, and did not constitute error. Stockton v. Department of the Navy, MSPB Docket No. SF07528110536 (5/11/82). Moreover, neither appellant has shown that the agency might have reached a different conclusion had any reply been made. I therefore find that appellants have failed

to establish harmful error, as alleged.

Unauthorized absence, by its very nature, disrupts the efficiency of the service.

Chiaverini v. United States, 157 Ct. Cl. 371 (1962); Desiderio v. Department of the Navy, 4 MSPB 171 (1980). As cited by the agency, strike participation by a Federal employee is violative of both civil and criminal statutes. 5 U.S.C. §7311(3) provides that an individual may not hold a position in the Federal Government if he participates in a strike. This has been held to establish removal as the mandatory penalty for strike participation.

American Postal Workers Union v. United States Postal Service, 628 F.2d 1280 (9th Cir. 1982). In Schapansky, supra, the Board did not answer the question as to whether it had authority to mitigate what appears to be a statutorily mandated pen-

alty. Rather, the Board found that in light of the nature and gravity of the offense of striking, as well as the direct, deleterious effects such conduct has on the efficiency of the service, mitigation of the penalty would not be warranted under the standards set forth in Douglas v. Veterans Administration, MSPB Docket No. AT075299006 (4/10/81). I therefore find that the agency's penalty selections in these cases were both reasonable and appropriate.

In summary, I find that the agency effected appellants' removals for such cause as will promote the efficiency of the service. 5 U.S.C. §7513(a).

DECISION

The agency's actions are hereby affirmed.

185a

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 22, 1983 unless a petition for review is filed with the Board.

* * *

For the Board:

s/William L. Garrett
William L. Garrett
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

PATRICK W. McCORMACK

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

CASE NO. DC075281F1056
DATE: January 20, 1983

INTRODUCTION

Appellant filed an appeal from the agency's action removing him from the position of Air Traffic Control Specialist, GS-12, effective August 24, 1981.

JURISDICTION

The action appealed was effected under subpart D of Part 752 of the Office of Personnel Management regulations, which

was promulgated pursuant to OPM's authority under 5 U.S.C. §7514. The record reflects that appellant was a covered employee as defined by subpart D, and was entitled to appeal this action to the Board. See 5 U.S.C. §§7511(a)(1)(A), 7512, 7513(d); 5 C.F.R. §§752.401(a), 752.401(b)(1), 752.405(a). I therefore find that the appeal is properly before the Board for adjudication.

ANALYSIS AND FINDINGS

By letter dated August 6, 1981, the agency proposed appellant's removal on the basis of two charges (1) participation in a strike against the United States Government in violation of 5 U.S.C. §7311 and 18 U.S.C. §1918; and (2) unauthorized absence. Both charges stem from appellee's participation in a strike against the United States Government in violation of 5 U.S.C. §7311 and 18 U.S.C. §1918. Appellee's participation in the strike is the primary issue in this case.

lant's failure to report for duty on August 3, 4, and 5, 1981.

The Board has taken official notice of the fact that members of the Professional Air Traffic Controllers Organization (PATCO) engaged in an illegal strike against the Federal Government from August 3, 1981 through at least August 6, 1981. Ketchem v. Department of Transportation, MSPB Docket No. DA075281F0713 (5/28/82). In addition, the Board has found that an employee's unauthorized absence during the period of such a strike may constitute a *prima facie* case of said employee's participation therein. Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 (10/28/82); Jones v. Tennessee Valley Authority, MSPB Docket No. AT07528010300 (2/19/82); Ducket and Yardley v. Tennessee Valley Authority,

MSPB Docket No. AT07528010325 (2/19/82).

Appellant admits that he was absent without authorization on August 3, 4, and 5, 1981. However, he claims that he did not voluntarily participate in the strike, but rather remained away from work due to harassment and intimidation on the part of PATCO officials and "militant" union members, as well as "encouragement" from supervisory personnel. In this regard, the Board has stated that an appellant making such a claim "must demonstrate, by a preponderance of the evidence, that his failure to report for work was the result of a threat or other intimidating conduct, directed toward him, sufficient to instill in him a reasonable fear of physical danger to himself and others, which a person of ordinary firmness would not be expected to resist." Johnson v. Department of

Transportation, MSPB Docket No. DC075281-F0998 (11/10/82). In the instant case, appellant has identified no direct threats or intimidating conduct which could reasonably be expected to instill fear or physical danger. His alleged fears related to possible difficulty in "checking out" (completing a period of training) and future on-the-job harassment. The Board has held that such considerations are insufficient to render strike participation involuntary. Johnson, supra, at 8-9.

Appellant also alleged that he was very upset during this time period, and that he was physically and emotionally unable to perform his duties. He expressed particular concern that, due to the inadequate staffing conditions, he might cause an accident and be held liable in the event

of a crash. However, appellant presented no medical evidence in support of his claims of physical and mental incapacity, and he admitted that he never called in to request sick leave. In fact, appellant did not even mention this claim in his written reply to the proposal notice, his initial petition for appeal to the Board, or in response to the agency's interrogatories. With specific reference to appellant's alleged fears regarding inadequate staffing and the possibility of being the cause of an accident, a simple telephone call to his facility could have alleviated any such fears. Moreover, appellant has little standing to complain about, or use as an excuse, a situation which he helped to create by his own authorized absences.

Mr. McCormack also alleges that he was confused regarding the application of

President Reagan's "deadline" of 11:00 a.m. on August 5, 1981. However, had appellant truly desired or intended to return to work, any alleged confusion could have been alleviated by reporting for duty, or simply making a telephone call to the facility. Yet appellant took no such reasonable steps for himself or, in light of his office as Vice President of his PATCO local, any other controllers who allegedly wished to return to work. I therefore find that any alleged confusion had no effect on appellant's ability to return to duty, had he so desired.

Appellant also contended that he was subjected to disparate treatment in that the Tower Chief made personal telephone calls to selected individuals in an attempt to convince them to return to duty. The Tower Chief denied that she made any such

calls, and the two employees in question, William Carver and Ellen Gunnulfsen, both testified that they received no calls from the Chief. Although their families were contacted, in one case by a team supervisor and in the other by a former facility chief, both employees testified that they made up their own minds on August 4, 1981 to return. Moreover, appellant has failed to show that any "plea" from the Tower Chief would have had any greater impact than President Reagan's call to return to work. I therefore find no merit in appellant's argument.

I find that the agency established a prima facie case of strike participation, and that appellant has failed to rebut it. Moreover, appellant has admitted that he was absent without authorization, as alleged. I therefore find that the

charges as set forth in the proposal notice are supported by a preponderance of the evidence, and are sustained.

Unauthorized absence, by its very nature, disrupts the efficiency of the service.

Chiaverini v. United States, 157 Ct. Cl. 371 (1962); Desiderio v. Department of the Navy, 4 MSPB 171 (1980). As cited by the agency, strike participation by a Federal employee is violative of both civil and criminal statutes. 5 U.S.C. §7311(3) provides that an individual may not hold a position in the Federal Government if he participates in a strike. This has been held to establish removal as the mandatory penalty for strike participation.

American Postal Workers Union v. United States Postal Service, 628 F.2d 1280 (9th Cir. 1982). In Schapansky, supra, the Board did not answer the question as to

whether it had authority to mitigate what appears to be a statutorily mandated penalty. Rather, the Board found that in light of the nature and gravity of the offense of striking, as well as the direct, deleterious effects such conduct has on the efficiency of the service, mitigation of the penalty would not be warranted under the standards set forth in Douglas v. Veterans Administration, MSPR Docket No. AT075299006 (4/10/81). I therefore find that the agency's penalty selection in this case was both reasonable and appropriate.

In summary, I find that the agency effected appellant's removal for such cause as will promote the efficiency of the service. 5 U.S.C. §7513((a)).

196a

DECISION

The agency's action is hereby affirmed.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 22, 1983 unless a petition for review is filed with the Board.

* * *

For the Board:

s/William L. Garrett
William L. Garrett
Presiding Official

197a

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RICHARD E. SWAUGER,

v.

FEDERAL AVIATION ADMINISTRATION

CASE NO. DC075281F1133
DATE: January 18, 1983

INTRODUCTION

The appellant filed an appeal on September 14, 1981, from action taken by the Federal Aviation Administration removing the appellant from his position of Air Traffic Control Specialist, GS-14, effective August 23, 1981, for striking against the Government of the United States and for

absence without leave (AWOL).^{1/}

JURISDICTION

Sections 7513(d) and 7701(a) of Title 5, U.S.C., permit an employee to appeal to the Board from agency action involving a removal. I find that the appellant held the position in the competitive service and that he was not serving a probationary period. I find, therefore, that this appeal is properly before the Board. 5 U.S.C. Section 7511(a).

BACKGROUND

On August 6, 1981, Mr. Harry Hubbard

• 1/ This appeal and the appeal of David F. Gardner et al were consolidated for hearing purposes under the name of Richard E. Swauger et al. Subsequent to the hearing, however, I determined that the issues raised by the appellants in Gardner were identical and, consequently, I consolidated them for decision purposes. The transcripts of the hearing remain under the name of Swauger et al.

advised the appellant that he was proposing his removal from his position of air traffic control specialist for two reasons. The first reason involved the alleged violation of 5 U.S.C. Section 7311, which makes it unlawful for an individual to "accept or hold a position in the Government of the United States", when he "participates in a strike, against the Government of the United States," and of 18 U.S.C. Section 1918, which makes a federal employee's participation in a strike a crime for which a sentence of imprisonment can be imposed. Mr. Hubbard told the appellant that a nationwide strike by air traffic controllers commenced at approximately 7 a.m. EDT, August 3, 1981. Mr. Hubbard continued that since the appellant failed to report for duty at his scheduled time of 1500 to 2300 hours

(3 p.m. to 11 p.m.), August 4, 1981, he participated in a strike against the Government of the United States.

The second reason for appellant's removal was based on an unauthorized absence. Mr. Hubbard explained that, on August 3, 1981, the agency sent the appellant a telegram advising him that an illegal strike was in progress and instructed the appellant to return to duty at his regularly scheduled shift. Mr. Hubbard continued that the appellant failed to return to duty and "instead remained absent without authorization".

Mr. Hubbard concluded that, since the aforementioned facts constituted a strike against the government prohibited by 18 U.S.C. Section 1918 and 5 U.S.C. Section

7311, he had "reasonable cause to believe [that the appellant had] committed a crime for which a sentence of imprisonment [could] be imposed." Mr. Hubbard then afforded the appellant seven days within which to reply to the notice.

By letter dated August 11, 1981, the appellant responded to the notice of proposed removal and, after requesting additional time within which to reply to the substance of the notice, asserted that there was no basis for the agency to conclude that he had committed a crime for which a sentence of imprisonment could be imposed and that, consequently, he should have been given 30 rather than 7 days to respond. Additionally, the appellant requested copies of all the documents relied upon by the agency in reaching its

decision proposing his removal. Appellant's letter was not received by the agency until August 24, 1981, 18 days after the date of the notice. On the same day, however, Mr. Hubbard responded denying appellant's request for additional time, finding that the reasons proffered by the appellant were not "appropriate to justify extension of the time limit". Mr. Hubbard told the appellant that the material relied on by the agency could be found at Washington Tower.

On August 19, 1981, Mr. Hubbard issued his final decision removing the appellant, effective August 23, 1981. In so doing, Mr. Hubbard indicated that the appellant made no oral or written reply. This appeal followed.

ANALYSIS AND FINDINGS

In order for the agency's decision removing the appellant to be sustained on appeal to the Board, the agency must show that it is supported by a preponderance of the evidence. 5 U.S.C. 7701(c)(1)(B); 5 C.F.R. 1201.56(a)(ii). The Board's regulations define the phrase "preponderance of the evidence" to mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true". 5 C.F.R. 1201.56(c)(2). Further, in Ketchem v. Federal Aviation Administration, MSPE Dkt. No. DA075281F0713 (May 28, 1982), the Board took official notice that the Professional Air Traffic Controllers Organization (hereinafter referred to as PATCO)

called a nationwide strike of air traffic controllers and that such strike commenced on August 3, 1981 and was still in progress on August 6, 1981. Since the appellant has presented no evidence refuting this finding, I, too, will take official notice about the duration of the strike.

I find that the President gave the striking controllers a 48 hour grace period commencing from August 3, 1981, to return to their jobs. See 17 Weekly Comp. Pres. Doc. 845 (1981). I further find that the agency, in implementing President Reagan's ultimatum to return to work, interpreted the President's directive to mean that striking controllers could report to work on their first scheduled shift after the expiration of the 48 hour grace period. See United States v. PATCO, 524 F. Supp.

160, 164 (D.D.C. 1981).

That the appellant did not report is not a matter in dispute. The record establishes that the appellant was briefed on June 10, 1981, about 18 U.S.C. Section 1918, which proscribes an individual from holding a position in the United States Government who "participates in a strike, . . . against the Government of the United States." 18 U.S.C. Section 1918(3). The record contains a facsimile of a telegram sent to the appellant wherein he is advised that an illegal strike was in progress, that participation could result in severe disciplinary action, that unauthorized absence indicates participation and that controllers like the appellant were to report for duty at their next scheduled shift. Mr. Harry T. Hubbard testified

that since the appellant did not return to duty nor contact the agency to explain his absence, he [Mr. Hubbard] concluded that the appellant was on strike against the Government of the United States.

In Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 (October 28, 1982), the Board noted that an agency "may establish a prima facie case of an employee's voluntary participation [in a strike] by presenting evidence of his unauthorized absence during the strike." Id., at 6 p.2. This, the agency has done.

I find that the agency has made a prima facie showing that the appellant was an active strike participant. Schapansky, supra. The appellant was scheduled to

report for work on August 6 and he failed to do so. This, together with the common knowledge of PATCO's strike and appellant's unauthorized and unexplained absences during this period, leads me to conclude that the appellant was an active strike participant. Id.

The appellant argues that he did not report to work during this period because he was not mentally able to perform the duties of an air traffic controller. The appellant cites two reasons for his mental deficiency. First, the appellant points to work he did on behalf of two former air traffic controllers, Messrs. David R. Trout and Leighton Adams, in assisting them in their efforts to retire on disability. With respect to Mr. Trout, the appellant testified that he first became

aware of Mr. Trout's heart disease in 1973 and, in May 1980, he and Mr. Trout testified before a House Congressional Committee investigating problems with the Office of Workmen's Compensation. In 1981, Mr. Trout finally began to receive his retirement checks. The appellant added that Mr. Trout then incurred tax problems, apparently in early 1981, and that he (the appellant) continued to assist Mr. Trout, devoting more time than ever to his case as late as July 1981.

With respect to Mr. Adams, the appellant indicated that he began working on his behalf in 1980 and that his efforts continued throughout 1981. The appellant represented that Mr. Adams suffered from high blood pressure and that he was unable to obtain disability retirement and, after

a June 23, 1981 adverse decision from the Office of Personnel Management, the appellant filed on Mr. Adams' behalf an appeal with the Merit Systems Protection Board. The appellant noted that he was working on Mr. Adams' case when informed by telephone, apparently on August 3, 1981, that he had been fired by the President of the United States.

The second reason the appellant gives for his absence during the period of the strike is based upon his involvement in what has been referred to as a "system error" that occurred on July 27, 1981, approximately seven days before the start of the strike. The appellant explained that on that day a civil jet was preparing for departure on runway 36 and that a "civil prop" was inbound on runway 33,

which intersected runway 36. The appellant continued that he cleared the jet for departure but forgot about the incoming prop, resulting in both airplanes approaching the intersecting point. After his supervisor advised the appellant of an impending collision, the appellant hurried the prop through the intersection. The appellant represented that he was upset, as he had forgotten an aircraft under his control, something which had never happened to him before. The appellant added that he requested to take the entire week off, but his request for leave was denied. Thus, continued the appellant, he went to work during the week of July 27, 1981, precisely one week before the start of the strike called by PATCO, knowing that Mr. Leighton Adams was having difficulties and was about to be fired, and thinking about the system error in which he had been

involved. The appellant concluded that he did not want to go back during the week of July 27 because he could not concentrate on his work.

That the appellant was actively involved in representing members of PATCO and that a system error occurred are not in dispute. Indeed, with respect to appellant's activities as a representative, his testimony as well as that of Mr. Hubbard's indicates that the appellant had long been involved in this type of activity and that, on occasions, the appellant was given leave to perform this function.^{2/} As regards a system error, testimony was

^{2/} With respect to Mr. Leighton Adams, who worked out of the Phoenix TRACON, the record suggests that the appellant traveled to Mr. Adams duty station and that leave was given for this purpose.

given that controllers involved in such mishaps generally do one or two things, namely, take a leave or absence or continue to work traffic. Testimony was also given that the best therapeutic measure is for the controller to continue working. Mr. Hubbard testified that he did not believe that the appellant, having 27 years of experience as an air traffic controller, would allow a system error to seriously affect him. The appellant represented that it was not so much the occurrence of the system error which disturbed him as it was the fact that it was happening to him. In his representations, the appellant attributed its occurrence to the fact that he was becoming deeply

embroiled in the appeals of Messrs. Adams and Trout.^{3/}

I find that the appellant has not rebutted the agency's prima facie case that he was an active strike participant. While I find that the appellant was actively involved in representing certain former air traffic controllers, and while the appellant may have been affected by the system error, I am not persuaded that these findings are sufficient to justify appellant's failure to report to work on August 4 and 5 or by the start of his deadline shift on August 6. The appellant

3/ The appellant also testified that, during the period in question, his mother was seriously ill, having had two recent operations related to heart disease. Mr. Trout testified that he drove the appellant to visit his mother in Pittsburgh after the job action commenced.

did not call the facility at anytime during the period of the strike to explain his absence or to request leave on account of his mental inability to perform air traffic duties. I note that upon the occurrence of the system error on July 27 the appellant requested leave but that it was denied. I find that the appellant could have renewed his request for leave during the period of his absence.

I further find, based upon appellant's testimony, that he complied with the local's request on August 6 or 7 to come to the union hall to brief controllers on their appeal rights, as they did not know what to do. I find appellant's compliance to indicate that he was not so mentally impaired as he seems to argue. I further find appellant's compliance with PATCO's

request to indicate that he was able to work during his absence from work.

I find, therefore, that the appellant has not successfully rebutted the agency's prima facie case of strike participation.

The agency also charged the appellant with AWOL for the same days on which he failed to report to work during the period of the strike. Since I have found the first charge of striking to be supported by the evidence, I find the AWOL charge equally supported. In this connection, I note that the Board has found AWOL and striking to be just cause for removal, since they, by their very nature, disrupt the efficiency of the service. Schapansky, supra; Butler v. Smithsonian Institution, MPSB Docket No. DC07528090076 (March 30,

1981); Desiderio v. United States Department of the Navy, MSPB Docket No. PH07528-010036 (November 17, 1980).

Accordingly, I find the agency's charges supported by a preponderance of the evidence and that appellant's removal is for such cause as will promote the efficiency of the service. Hampton v. Young, 568 F.2d 1253, 1262, 1264 (7th Cir. 1977); Schapansky, supra.

DECISION

The agency action removing the appellant is hereby AFFIRMED.

NOTICE

This decision is an initial decision and will become a final decision of the Merit

217a

Systems Protection Board on February 22,
1983 unless a petition for review is filed
with the Board.

* * *

For the Board:

s/ William L. Garrett
William L. Garrett
Presiding Official

AUG 17 1987

No. 86-1746

JOSEPH E. SPANICK, JR.
CLERK**In the Supreme Court of the United States****OCTOBER TERM, 1987**

LINDA J. DARNELL (ROSE), ET AL., PETITIONERS

v.

**DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

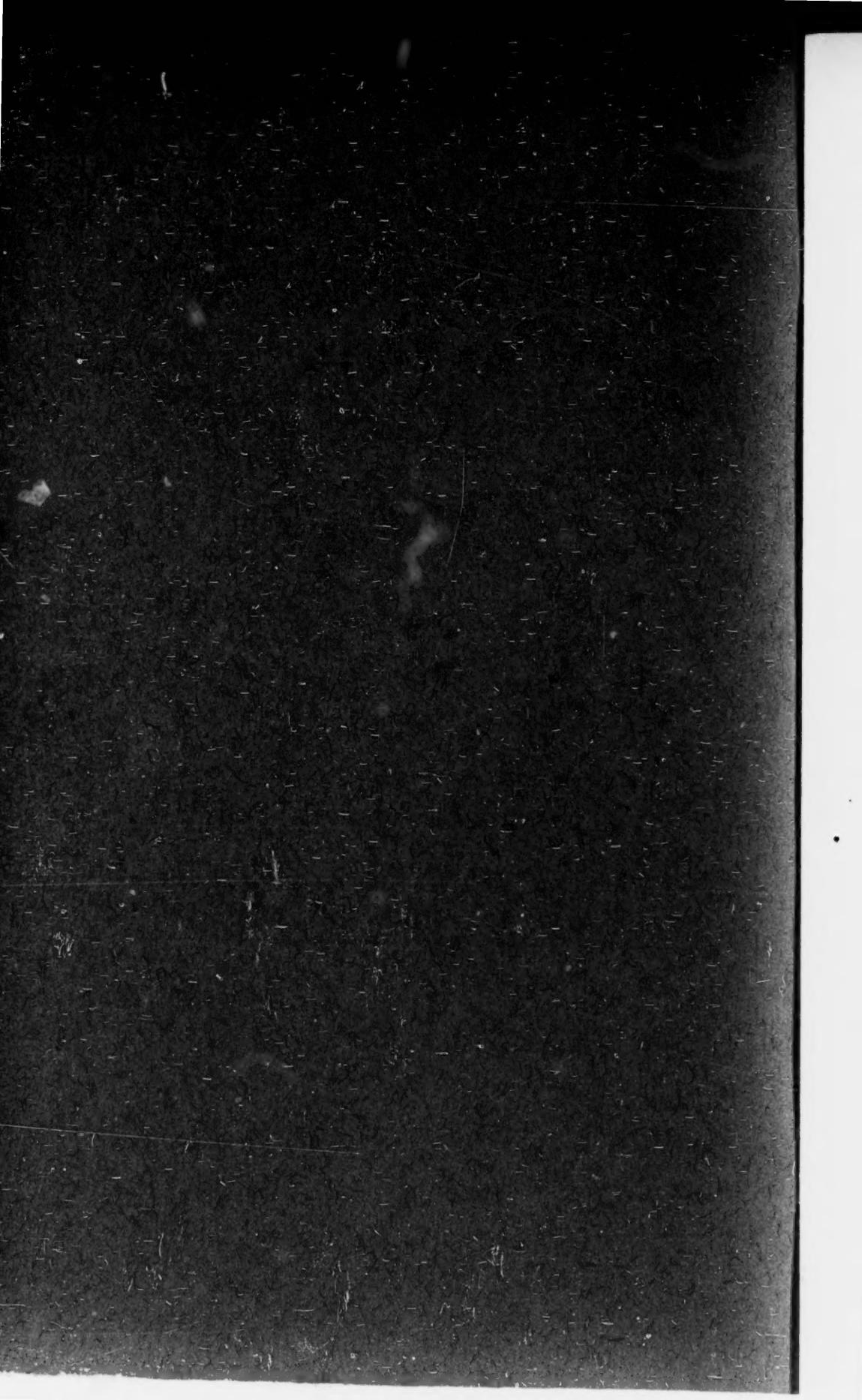
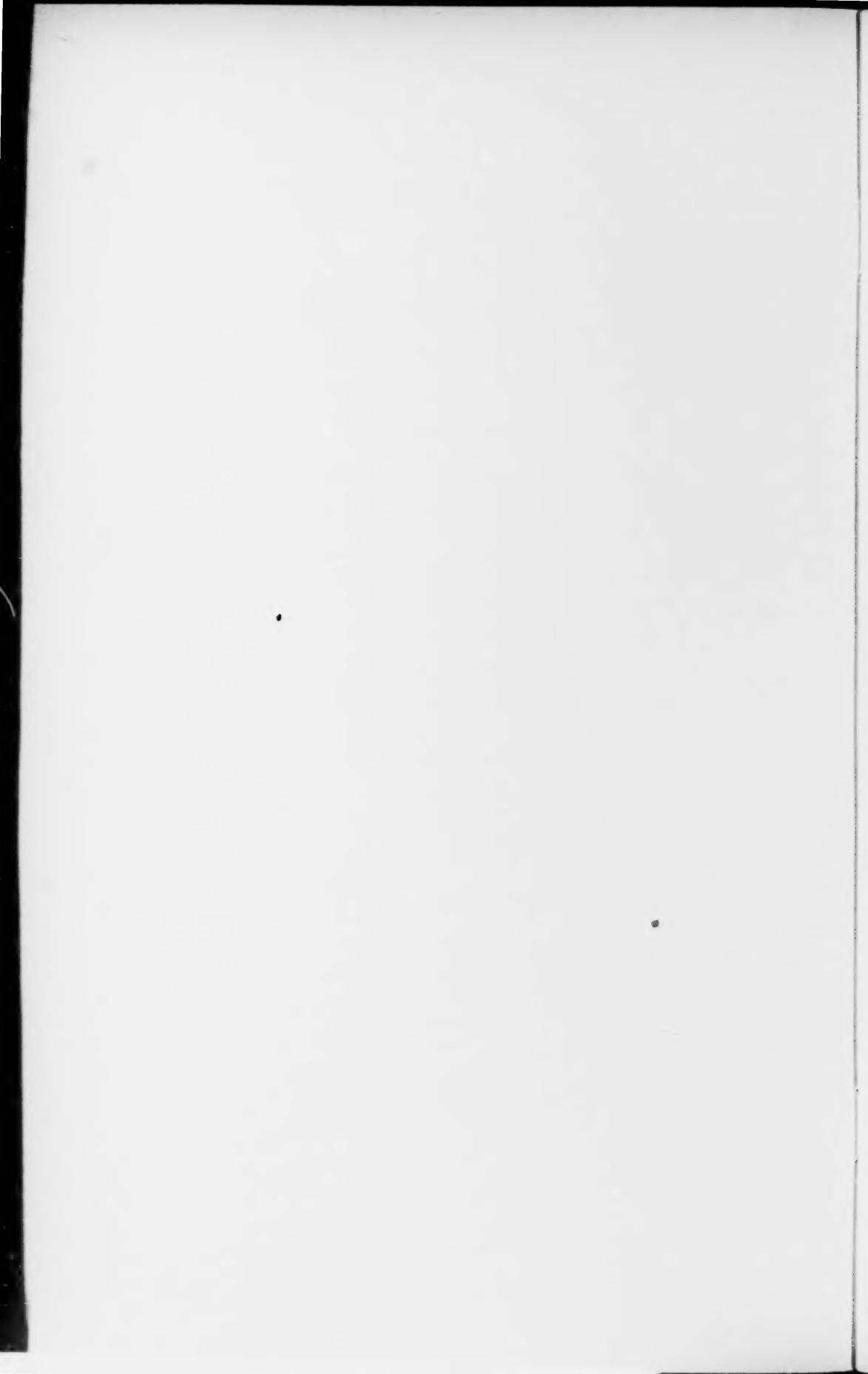


TABLE OF AUTHORITIES

	Page
Cases:	
<i>Adams v. Department of Transportation, FAA</i> , 735 F.2d 488 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984)	5
<i>Campbell v. Department of Transportation, FAA</i> , 735 F.2d 497 (Fed. Cir.), cert. denied, 469 U.S. 881 (1984) .	1, 4-5
<i>Cleveland Board of Education v. Loudermill</i> , 470 U.S. 532 (1985)	3, 4, 5, 7
<i>Cornelius v. Nutt</i> , 472 U.S. 648 (1985)	5, 6, 7
<i>Delaware v. Van Arsdall</i> , No. 84-1279 (Apr. 7, 1986)	5
<i>Mercer v. Dep't of Health & Human Services</i> , 772 F.2d 856 (Fed. Cir. 1985)	7
<i>Parker v. Defense Logistics Agency</i> , 1 M.S.P.B. 489 (1980)	6
<i>Schapansky v. Department of Transportation, FAA</i> , 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984)	5, 6
<i>Smith v. United States Postal Service</i> , 789 F.2d 1540 (Fed. Cir. 1986)	7
<i>United States v. Hasting</i> , 461 U.S. 499 (1983)	5
<i>United States v. Mechanik</i> , No. 84-1640 (Feb. 25, 1986)	5
<i>Wisniewski v. United States</i> , 353 U.S. 901 (1957)	7
Statutes and regulation:	
Civil Service Reform Act of 1978:	
5 U.S.C. 7513(b)	6
5 U.S.C. 7701(c)(2)	5
5 U.S.C. 7701(c)(2)(A)	5
18 U.S.C. 1918	6
5 C.F.R. 1201.56(c)(3)	5



In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1746

LINDA J. DARNELL (ROSE), ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that constitutionally inadequate pretermination procedures invalidated their dismissal from public employment.

1. a. Petitioners, former air traffic controllers, challenge their removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and the course of the subsequent litigation are set forth in our brief in opposition in *Campbell v. Department of Transportation, FAA*, cert. denied, 469 U.S. 881 (1984), one of a number of other cases arising out of the strike.¹ Petitioners received notices of proposed removal from the Federal Aviation Administration (FAA). The notices charged them with participating in the strike and notified them that they must send any reply to the charge within seven days of receiving the notice. Pet. App. 3a-4a, 33a-37a, 142a-145a; Pet. 7-8.

¹ A copy of our brief in *Campbell* has been sent to counsel for petitioners.

Petitioners worked at control towers in the Washington, D.C. area: either at Andrews Air Force Base, Camp Springs, Maryland, or at Washington National Airport. Although each notice of proposed termination was signed by the appropriate Tower Chief (the local supervisor), the return address on each was the FAA's regional office in New York City. Petitioners sent timely letters to the New York office requesting an extension of the reply deadline.² Because of the delay caused when petitioners mailed their requests to New York, their supervisors issued termination letters before petitioners' requests reached them. The termination letters noted that petitioners had made no oral or written reply to the charges. Several days later, however, after receiving the delayed requests for extensions, the appropriate Tower Chief sent a second letter to each petitioner. These letters referred to the delay but added: "[W]e have carefully considered your request and find no reason to alter our decision [to terminate you]." Pet. App. 49a-50a.³

b. All petitioners appealed to the Merit Systems Protection Board (MSPB) where the presiding officials upheld all the terminations. The presiding officials found that any error causing the late receipt of petitioners' replies was harmless because the Tower Chiefs had "reviewed the replies when they were finally received, and determined that there was nothing in them which would alter [their]

² The Merit Systems Protection Board found that at least one of the petitioners, Richard E. Swauger, was "admittedly experienced in personnel matters" but "contributed to the confusion by sending his request to New York, rather [than] to his facility chief" (Pet. App. 119a).

³ The record contains only the letter sent to petitioner Darnell; the presiding official of the Merit Systems Protection Board found that other petitioners had received identical letters indicating that their replies had been considered (Pet. App. 119a, 132a). Petitioners agree, as they have throughout this litigation, that all petitioners received the second letter. See Pet. 9-10.

decisions.” Pet. App. 132a; see also *id.* at 119a. The presiding officials also found that petitioners had failed to demonstrate that had their Tower Chiefs received their initial replies on time, they would have granted extensions (Pet. App. 163a-164a).

The full Board affirmed the findings and conclusions of the presiding officials upholding the terminations. On review, the United States Court of Appeals for the Federal Circuit also affirmed. The court held in the lead case (*Darnell (Rose) v. Department of Transportation, FAA* (Pet. App. 1a-54a)) that the “perhaps premature” issuance of the removal letters was harmless error (*id.* at 11a).⁴ The court found that the Tower Chief did consider petitioners’ letters when they were received, that the letters “do not indicate that petitioners could or would have presented proof prior to the issuance of the removal letters that could have affected the FAA’s factual conclusion that both petitioners participated in the strike” (*id.* at 10a), or suggest “that receipt of the replies prior to issuance of the removal letters could have affected the agency’s underlying factual conclusion” (*id.* at 11a). The court of appeals also noted (*ibid.*) that petitioners had received a full post-termination hearing before the MSPB, where they failed to show any legal defense or other reason why they should not be terminated. The panel majority thus concluded that petitioners received the “meaningful opportunity to invoke the discretion of the decisionmaker” required by this Court’s decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985). Senior Judge Cowen dissented, arguing that harmless error analysis was inapplicable to petitioners’ due process claim and that, in any event, the error was not harmless (Pet. App. 13a-31a).

⁴ Relying on this decision, it sustained the removal of the other petitioners in unpublished opinions (Pet. App. 55a-70a).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other circuit. Further review is therefore unwarranted.

a. The court of appeals correctly held that petitioners were afforded an "opportunity to present [their] side of the story" before being terminated, as *Loudermill* requires (470 U.S. at 546). When the Tower Chiefs realized that petitioners had sent timely replies to the charges, they reviewed the replies and affirmed the terminations. Unlike *Loudermill*, where the employee simply received a termination notice to which he had no opportunity to reply, and the termination was made official a few days later, petitioners were invited to reply to the notice of the charges, and the Tower Chiefs considered petitioners' replies when they were eventually received.

Petitioners protest (Pet. 36-39) that they never intended their initial reply to be a full denial. But *Loudermill* does not give them a constitutional right to defer any substantive response to suit their own convenience. The Court there said, "[t]he essential requirements of due process *** are notice and an opportunity to respond. *** The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *** To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee" (470 U.S. at 546 (emphasis added)). Petitioners received both notice and an opportunity to respond, and they offered no sufficient reason why they should not be terminated. As the court of appeals found (Pet. App. 8a), if the agency erred at all, its errors "were not errors of constitutional dimension."⁵

⁵ In the lead air traffic controller cases, this Court declined to review the claim that procedural errors could not be deemed harmless. See *Campbell v. Department of Transportation, FAA*, 735 F.2d 497

In any event, unlike the employees in *Loudermill*, who had "plausible arguments to make that might have prevented their discharge" (470 U.S. at 544), petitioners, who have now received full de novo post-termination hearings before the MSPB, have not shown that their terminations "involved arguable issues" (*ibid.* (footnote omitted)).⁶ In the absence of any substantive basis for challenging the termination, any error in the pretermination consideration of petitioners' claims was clearly harmless. See, e.g., *Delaware v. Van Arsdall*, No. 84-1279 (Apr. 7, 1986); *United States v. Hasting*, 461 U.S. 499 (1983); *United States v. Mechanik*, No. 84-1640 (Feb. 25, 1986).

b. To the extent petitioners assert statutory claims (compare Pet. Question Presented with Pet. 17-19), they are equally meritless. Under the Civil Service Reform Act of 1978, an agency decision to remove an employee may be overturned if the employee shows "harmful error," 5 U.S.C. 7701(c)(2)—that is, one that might have affected the agency's conclusion, 5 C.F.R. 1201.56(c)(3). In language endorsed by this Court (see *Cornelius v. Nutt*, 472 U.S. 648, 658-659 & n.11 (1985)), the MSPB has required an employee to show it is "within the range of appreciable probability" that the agency might have decided

(Fed. Cir.), cert. denied, 469 U.S. 881 (1984); *Schapansky v. Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). The conclusion that purely procedural errors are necessarily harmful would be inconsistent with the provision of 5 U.S.C. 7701(c)(2)(A) that an agency decision may be overturned only for a "harmful error" in procedures. *Adams v. Department of Transportation, FAA*, 735 F.2d 488, 495-496 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984).

⁶ Although petitioners suggest (Pet. 28 & n.2) that petitioner Swauger's defense of "emotional incapacitation to work" might have prevailed at a pretermination hearing, the presiding official found that he had failed to rebut the agency's prima facie case of strike participation because he failed to explain his absence to the FAA at the time, and simultaneously participated in union activities (Pet. App. 213a-215a). The MSPB affirmed (*id.* at 110a-115a).

differently but for the error. *Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489, 493 (1980). This Court has emphasized Congress's intent, in enacting the 1978 Act, that courts not prevent agencies from dealing expeditiously with erring employees simply because of "technical procedural oversights." *Nutt*, 472 U.S. at 662-663 & n.17 (citation omitted).

Petitioners have not even a colorable argument that the misdirection of their responses harmed them, in the absence of evidence (1) that their Tower Chiefs would have granted the extensions had they received the requests in time or (2) that they had some substantive defense to present. The grant or denial of the extensions was clearly a matter for the Tower Chiefs' discretion,⁷ and petitioners offered no reason why they could not reply in a timely fashion to the straightforward charge of engaging in an illegal strike. Moreover, there is not the slightest evidence that petitioners could have presented any arguments on the merits other than those in the "standardized PATCO form 'reply'" (Pet. App. 10a) that they first sent to New York.

c. Petitioners misread the court of appeals' opinion and significantly overstate its reach. The court did not hold that if an employee "merely hints" that he opposes his removal in the course of seeking an extension, he has waived his right to reply (Pet. 25-26). Rather, the court

⁷ Petitioners cast their request for an extension as a legal argument (based on 5 U.S.C. 7513(b)) that they were entitled to a 30-day notice of their removal because the FAA did not have reasonable cause to believe that they had committed a crime for which imprisonment could be imposed. The Federal Circuit found this contention meritless in *Schapansky v. Department of Transportation, FAA*, 735 F.2d at 486 (noting that 18 U.S.C. 1918 clearly makes participation in a strike against the government such a crime).

found that under the particular circumstances of this case, petitioners' initial replies disclosed no reason for the FAA to revisit its decisions. The court expressly noted (Pet. App. 10a) the insufficiency of petitioners' "standardized PATCO form 'reply,' " which stated merely that " 'there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed.' "⁸

Both the court of appeals and the MSPB have had substantial experience with the delaying tactics of terminated air traffic controllers. The court rightly determined that it would not " 'force the Government to retain these erring employees solely in order to 'penalize the agency' for non-prejudicial procedural mistakes' " (Pet. App. 9a (quoting *Cornelius v. Nutt*, 472 U.S. at 663)).

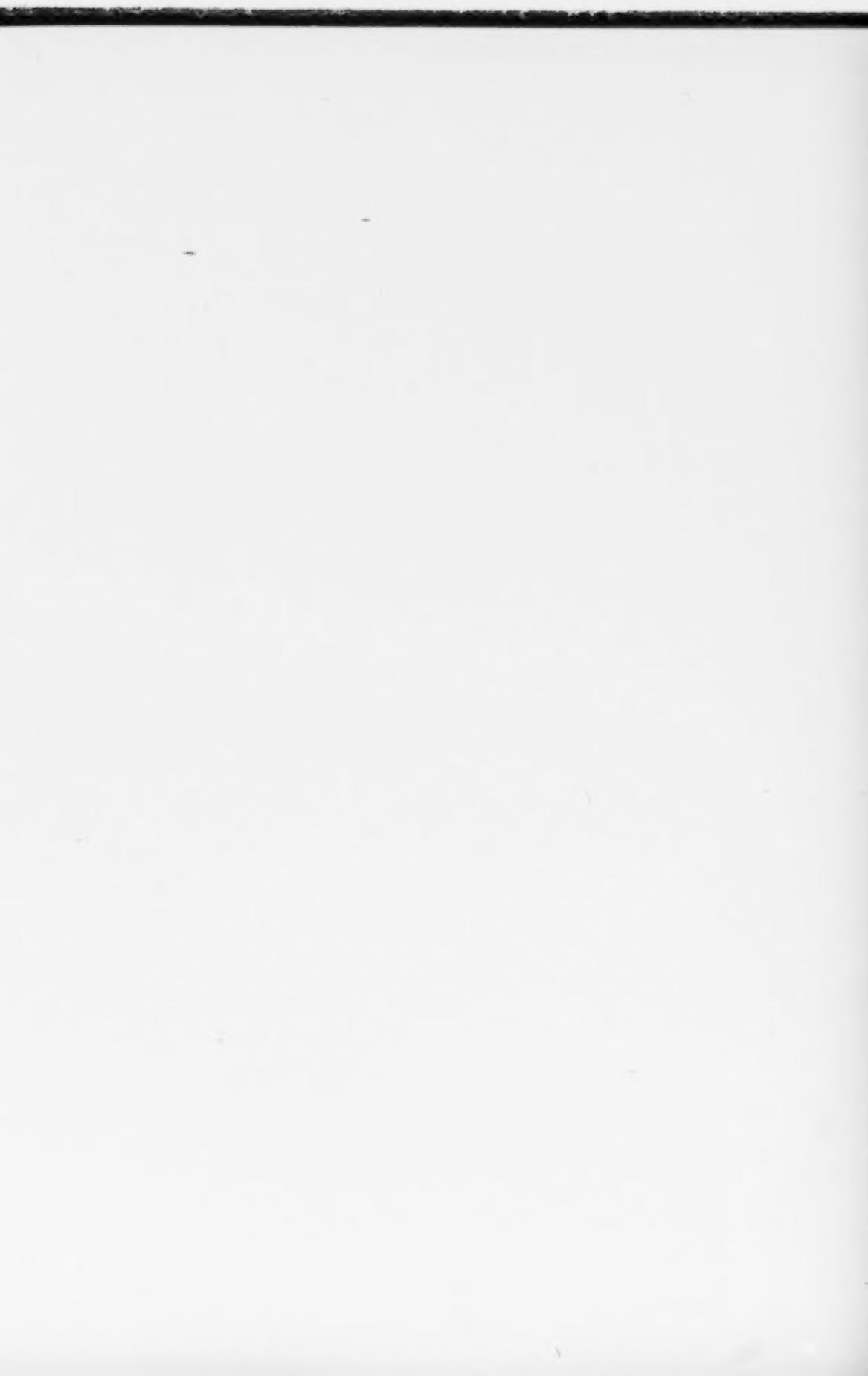
* Petitioners' claim of an intra-circuit conflict does not merit review by this Court. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). There is, in any event, no such conflict. *Smith v. United States Postal Service*, 789 F.2d 1540 (Fed. Cir. 1986), upheld a termination even though the employee had received less than the statutorily required 30 days' notice (see note 7, *supra*). The agency in *Smith* never corrected its error as the FAA did here, yet the court still affirmed, emphasizing Congress's intent that technical errors alone should not prevent agencies from dealing expeditiously with errant employees. 789 F.2d at 1545 (citing *Cornelius v. Nutt*, 472 U.S. at 663 & n.17).

In *Mercer v. Dep't of Health & Human Services*, 772 F.2d 856 (Fed. Cir. 1985), as petitioners admit, the court found no denial of due process under *Loudermill* where the employee had an opportunity to reply (772 F.2d at 859). The court ruled that the agency's clear procedural error — flatly denying the employee a pretermination hearing explicitly required by agency regulations — was harmful, but only because the employee offered undisputed evidence of a difference of opinion within the agency that a hearing might have resolved in the employee's favor (*id.* at 859-860). The court held that the employee must produce evidence of harmful error even as to such a clear, serious procedural error as the denial of a hearing (*ibid.*). Here, as the court of appeals correctly held, petitioners have produced no such evidence.

It is therefore respectfully submitted that the petition
for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1987



SEP 11 1987

JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1746

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LINDA J. DARNELL (ROSE), ET AL.,
PETITIONERS,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF OF PETITIONERS

Richard J. Leighton
LEIGHTON AND REGNERY
1667 K Street, N.W.
Washington, D.C. 20006
(202) 955-3900

Counsel for Petitioners

10/30/87



TABLE OF CONTENTS

	Page
1. FAA's Admitted Actions Prevented Petitioners From Having a Constitutionally-Required Hearing.	2
2. Petitioners' Letters Were Not Replies to the Charges and, Even If They Were, They Were Not Considered Prior to Termination.	5
3. An Intra-Circuit Conflict Merits Review Where the Circuit Has Exclusive Jurisdiction and the Issue Is Important.	10

TABLE OF AUTHORITIES

Cases:	Pages
<u>Adams v. Department of Transportation, FAA,</u> 735 F.2d 488 (Fed. Cir.), <u>cert. denied</u> , 469 U.S. 1018 (1984)	8,9
<u>Cleveland Board of Education v. Loudermill</u> , 470 U.S. 532 (1985)	4,6
<u>Darnell v. Department of Transportation, FAA</u> , 807 F.2d 943 (Fed. Cir. 1986)	3,9
<u>Kline v. Department of Transportation, FAA</u> , 808 F.2d 43 (Fed. Cir. 1986)	7
<u>Wisniewski v. United States</u> , 353 U.S. 901 (1957)	12
Statute:	
28 U.S.C. 1295(a)(9)	11

No. 86-1746

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

LINDA J. DARNELL (ROSE), ET AL.,
PETITIONERS,

V.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF OF PETITIONERS

Respondent's Memorandum In Opposition
demonstrates that the petition for certiorari

(1)

should be granted and that summary reversal should be given serious consideration.

1. FAA's Admitted Actions Prevented Petitioners From Having a Constitutionally-Required Hearing.

The Federal Aviation Administration (FAA) termination proposals instructed the petitioners to reply to the charges against them within seven days of receipt; as respondent admits, however, all petitioners lived and worked for the FAA in the Washington, D.C., area while "the return address on each [termination proposal] was the FAA's regional office in New York City." Respondent's Memorandum in Opposition (Res. Mem.) 1-2. In fact, both notices of proposed termination and the subsequent termination letters were on the stationery of the FAA Eastern Region headquarters in Jamaica, New York, to which the officials in petitioners'

Washington area facilities reported.^{1/} The FAA admits that, in response to the notices of proposed termination,

[p]etitioners sent timely letters to the New York office requesting an extension of the reply deadline. Because of the delay caused when petitioners mailed their requests to New York, their supervisors issued termination letters before petitioners' requests reached them. The termination letters noted that petitioners had made no oral or written reply to the charges.

Res. Memo. 2.^{2/}

1 Photographic reproductions of the documents appear in the reported opinion and retyped versions appear in the appendix here. See Darnell v. Department of Transportation, FAA, 807 F.2d 943, 950, 953 (Fed. Cir. 1986); Pet. App. 33a and 44a.

2 Respondent inappropriately implies that petitioners — none of whom ever before had been in a disciplinary proceeding under the Civil Service Reform Act of 1978 — contributed to the FAA's confusion by following common protocol. Res. Mem. 2 n.2. Respondent appears to suggest that petitioners should not have
(continued...)

The Due Process Clause "requires 'some kind of a hearing' prior to the discharge" of petitioners. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985) (citations omitted).

The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story [before being terminated].

Id. at 546 (citations omitted). In petition-

²(...continued)
sent their requests to the only return address given in their termination proposals, but should have taken a chance in complying with a 7-day deadline by mailing them to the last known local addressees of the officials who signed and sent the notices under the New York address.
Id.

ers' timely letters, petitioners expressly requested to see their employer's evidence and to have an opportunity to present their side of the story after seeing the evidence.^{3/} As shown above, petitioners were fired before their employer attempted to comply with their lawful requests and the law's parallel requirements.

2. Petitioners' Letters Were Not Replies to the Charges and, Even If They Were, They Were Not Considered Prior to Termination.

In its statement of facts, respondent notes that petitioners' initial responses to the termination proposals were for the purpose of "requesting an extension of the [7-day] reply deadline." Res. Mem. 2. However, in its argument, respondent (as did the FAA

³ Pet. App. 38a-40a (Rose letter, which is identical in all relevant respects to other petitioners' letters).

and the court below) incorrectly characterizes these letters as petitioners' "timely replies to the [substantive] charges" against them. Res. Mem. 4. The reasons why such a characterization is improper are set forth in the petition, Pet. 36-39, but are not addressed in respondent's opposition.^{4/}

Further, the FAA's treatment of petitioners' timely procedural requests as substantive replies was an unconstitutional expedient; it amounted to no less than a deprivation of a meaningful opportunity to reply under circumstances in which such an oppor-

4 Respondent only provides, at Res. Mem. 4, the following non sequitur:

Petitioners protest (Pet. 36-39) that they never intended their initial reply to be a full denial. But Loudermill does not give them a constitutional right to defer any substantive response to suit their own convenience.

tunity easily could have been provided.^{5/} This improper treatment and the agency's staunch defense of it fly in the face of the teaching of Loudermill and demonstrate the probability of a recurrence by the FAA and other organizations if this Court does not address the issue.

The Federal Circuit's treatment of petitioners' timely procedural requests for an extension of the 7-day reply time as a substantive denial of the charges is demonstrably clear error. Pet. 36-39. In fact, this

⁵ As Judge Cowen noted in his dissent, all petitioners' supervisors had to do was to rescind the terminations and allow petitioners to tell them their side of the story (an "oral pretermination hearing"). Rescissions were commonplace where the FAA supervisors made mistakes in notices sent to allegedly striking air traffic controllers. See, e.g., Kline v. Department of Transportation, FAA, 808 F.2d 43, 44 (Fed. Cir. 1986) (notice of proposed removal rescinded, reissued).

error is in direct conflict with the same court's treatment of the identical request in one of the lead air traffic controller cases, Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). In Adams, petitioners actually alleged that their reply extension requests were substantive denials of the charges because they stated that there was no basis for the charge of committing a crime. Id. at 490. The court, holding that no petitioner denied the charges, found that the petitioners' "assertion that a sentence in one stock PATCO response (challenging any basis for a charge of committing a crime) was a denial of the charges is creative, but unavailing. The sentence was directed at the agency's use of a shortened notice period." Id. at 490 n.2; see also Pet. 36-43 (which

explains why this is so because the request was referencing the statute's criminal charge exception to a required 30-day notice minimum). The same court, however, in order to find a substantive reply upon which to hang its harmless error holding, became "creative" in its approach to the identical request in Darnell, holding just the opposite of what it held in Adams:

Petitioner's (sic) standardized PATCO form "reply" to the agency's notice of proposed removal stated merely that "there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed." Such a response cannot suffice to overcome a prima facie showing of strike participation. *** Thus, the perhaps premature issuance of removal letters in the context of this case, where the written replies by the petitioners were considered by the agency after the fact and do not on their face give any indication that receipt of the replies prior to issuance of the removal letters could have affected the agency's underlying factual conclusion, was harmless error.

807 F.2d at 946 (emphasis added). Thus, not only is there an intra-circuit conflict on how to apply the principles of Loudermill, Pet. 17-35, there is a conflict on the legal interpretation of requests for extensions of the statute's 7-day minimum notice period.

3. An Intra-Circuit Conflict Merits Review Where the Circuit Has Exclusive Jurisdiction and the Issue Is Important.

The federal Executive Branch is the largest employer of public employees in the United States and, apparently, the organization that regularly terminates the largest number of employees.^{6/} As such, it sets an

⁶ In fiscal year 1986 the Executive Branch discharged 13,762 federal employees, 5,057 in tenured positions, from just those agencies reporting to the Central Personnel Data File; that is, these numbers do not reflect employees discharged from the U.S. Postal Service, Central Intelligence
(continued...)

example for countless state and local government officials.

The Federal Circuit has exclusive jurisdiction over the appeals of fired tenured federal employees who have failed to win their jobs back at the Merit Systems Protection Board. 28 U.S.C. 1295(a)(9) (Supp. 1987). Inconsistencies within the Circuit's decisions not only cause confusion among that court's panels, but throughout the substantial chain of adjudication that is controlled or influenced by the Circuit's interpretations: confusion among the Board members of the MSPB, who review appeals from decisions

⁶(...continued)

Agency, National Security Agency, Tennessee Valley Authority, White House Office, Board of Governors of the Federal Reserve Board, Federal Bureau of Investigation and Defense Intelligence Agency. See Office of Personnel Management, "Discharge and Related Data, FY 1986," at 1 and Table A.

by MSPB's administrative judges (formerly "presiding officials"); among the administrative judges who conduct evidentiary MSPB hearings nationwide; among the countless public officials who have to decide whether (and how) to fire their employees, and among the even larger number of public employees and those who represent them. Respondent's assertion that intra-circuit conflict does not merit review by this Court relies solely on Wisniewski v. United States, 353 U.S. 901 (1957). Such reliance is misplaced; that case easily is distinguished on jurisdictional grounds.^{7/}

⁷ In Wisniewski, this Court dismissed a certificate submitted by the Eighth Circuit before that Circuit attempted a decision. This Court held only that a Circuit's doubt about the respect to be accorded one of its own previous panel decisions should not be the occasion for invoking so exceptional a jurisdictional ground. (continued...)

All substantive arguments submitted by respondent on the important questions of federal law raised by this case remain controverted and, petitioners submit, such controversy demonstrates that a writ of certiorari should be granted.

Respectfully submitted,

September, 1987

Richard J. Leighton
LEIGHTON AND REGNERY
1667 K Street, N.W.
Washington, D.C. 20006
(202) 955-3900

Counsel for Petitioners

7 (...continued)

tion of the United States Supreme Court
as that on certification of questions.
353 U.S. at 902.